TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 445.

ASHTON C. SHALLENBERGER, GOVERNOR OF THE STATE OF NEBRASKA; SILAS R. BARTON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, ET AL., APPELLANTS,

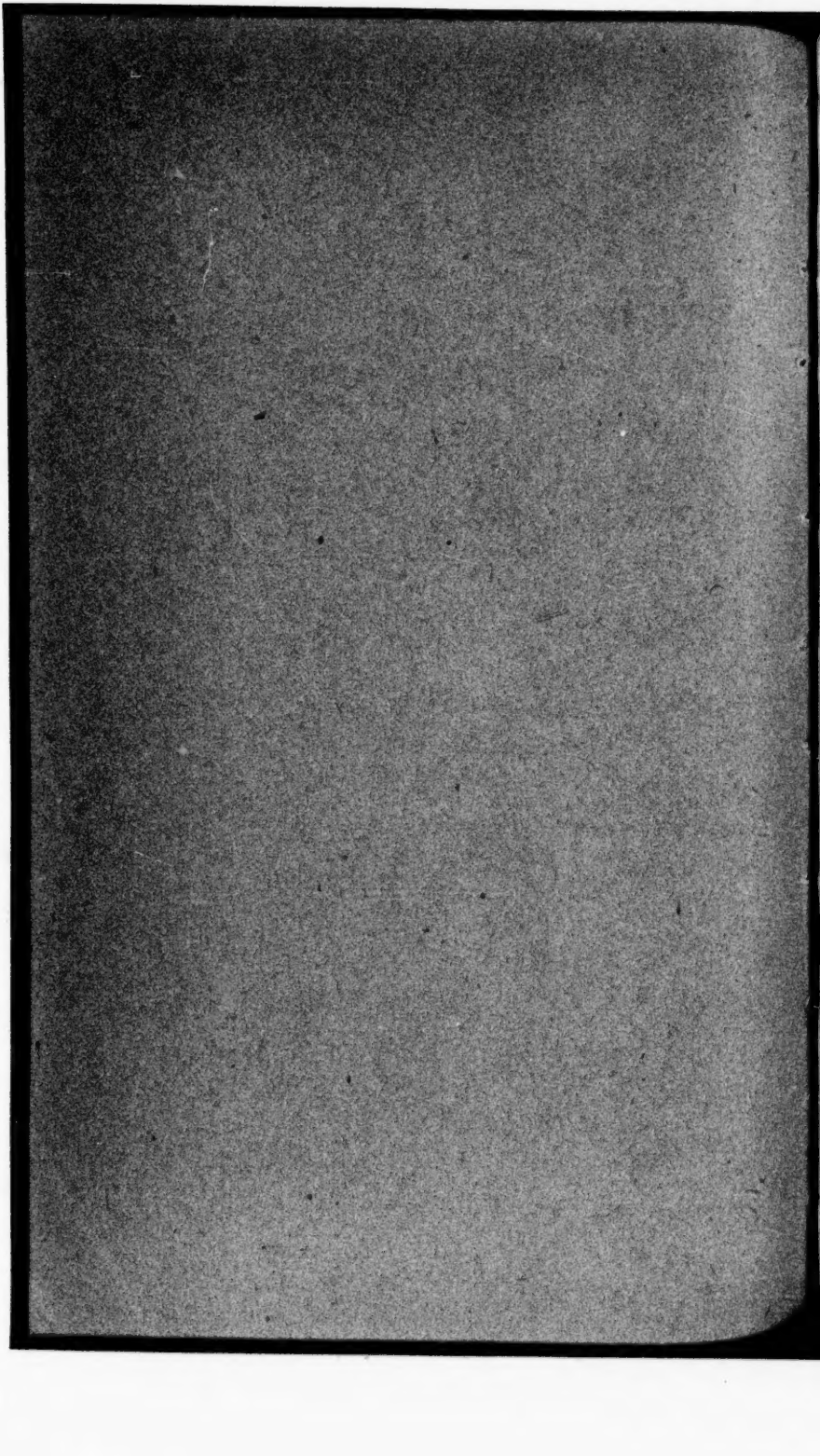
vs.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED FEBRUARY 17, 1910.

(22,025.)



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1 & 2 In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

No. 5, Docket B.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Complainants,
v.
ASHTON C. SHALLENBERGER, Governor of the State of Nebraska, et al., Defendants.

Appearances:

Mr. John L. Webster and Mr. William V. Allen for Complainants.

Mr. W. T. Thompson, Attorney General, Mr. Charles O. Whedon, and I. L. Albert for Defendants

Pleas Before the Honorable Willis Van Devanter, Judge of the Circuit Court of the United States for the Eighth Circuit, and the Honorable Thomas C. Munger, Judge of the District Court of the United States for the District of Nebraska, Sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the May, 1909, Term and the October, 1909, Term of the Lincoln Division of Said Court.

3 *Præcipe for Transcript.*

Filed Jan. 17, 1910.

In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

No. 5, Docket B.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Complainants,
v.
ASHTON C. SHALLENBERGER, Governor, etc., et al., Defendants.

Præcipe for Transcript.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Supreme Court, under the appeal heretofore perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

Præcipe for transcript.
Bill in equity,
Chancery subpœna, with marshal's returns,
Notice of hearing, with marshal's returns,
Objections to granting restraining order and motion to dismiss,
Motion to add parties plaintiff,
Order sustaining motion to add parties plaintiff,
Demurrer to bill,
Order granting temporary injunction,
Order submitting case for final decree,
Memorandum opinion on final decree,
Decree granting perpetual injunction,
Petition on appeal and order allowing appeal,
Assignments of error,
Cost bond on appeal,
Citation.

Said transcript to be prepared as required by law and the rules of the United States Supreme Court, and on file in the office of the clerk of the said Supreme Court before February 16, 1910.

CHAS. O. WHEDON,
I. L. ALBERT,
Solicitors for Appellants.

Indorsed: Filed Jan. 17, 1910. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

4 *Bill of Complaint.*

Filed June 21, 1909.

United States Circuit Court, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA; THE BANK OF Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank, of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank, of Denton, Nebraska; The Farmers' and Merchants' Bank, of Malmo, Nebraska; The Farmers' and Merchants' Bank, of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank, of Howells, Nebraska; The Saline County Bank, of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers' State Bank, of Fairmont, Nebraska; The Exchange Bank, of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon

State Bank, of Gordon, Nebraska; The Northwestern State Bank, of Hay Springs, Nebraska; The Bank of Danbury, of Danbury, Nebraska; The Morrill State Bank, of Morrill, Nebraska; The Banking House of A. Castetter, of Blair, Nebraska; The Farmers' State Bank, of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers' State Bank, of Orchard, Nebraska; The Brunswick Bank, of Brunswick, Nebraska; The Farmers' and Traders' Bank, of Wakefield, Nebraska; The Elkhorn Valley Bank, of Tilden, Nebraska; The Laurel State Bank, of Laurel, Nebraska; The Belden Bank, of Belden, Nebraska; The Farmers' State Bank, of Laurel, Nebraska; The Citizens' State Bank, of Battle Creek, Nebraska; The Citizens' State Bank, of Petersburg, Nebraska; The Inman State Bank, of Inman, Nebraska; The Emmet State Bank, of Emmet, Nebraska; The Elgin State Bank, of Elgin, Nebraska; The Atlas Bank, of Neligh, Nebraska; The Oakdale Bank, of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank, of Royal, Nebraska; The Citizens' Bank, of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The American Bank, of Sidney, Nebraska; The Farmers' State Bank, of Big Springs, Nebraska; E. E. Halstead, Doing a Banking Business, as a Private Banker, under the Name of The Bank of Dixon County, at Ponca, Nebraska, Unincorporated, and J. S. Gifford, Doing a Banking Business, as a Private Banker, under the Name of The Republican City Bank, of Republican City, Nebraska, Unincorporated, Plaintiffs,

5 v.

ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of the State of Nebraska; L. G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Ed Royse, Secretary State Banking Board, and Sam Patterson, Defendants.

In Equity.

Now come the plaintiffs above named, in their own behalf, and in behalf of all other banks of the state of Nebraska similarly situated, and who desire to join herein, and share the benefits of this proceedings, and jointly and severally aver that each and all of them are incorporated banking companies incorporated and existing under and by virtue of the laws of the state of Nebraska, excepting the following named plaintiffs: E. E. Halstead, doing a banking business, as a private banker, under the name of The Bank of Dixon County, at Ponca, Nebraska, unincorporated, and J. S. Gifford, doing a banking business, as a private banker, under the name of The Republican City Bank, of Republican City, Nebraska, unincorporated; and that the several defendants, Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, L. G. Brian, State Treasurer

of the State of Nebraska, William T. Thompson, Attorney General of the State of Nebraska, Ed. Royse, Secretary State Banking Board, and Sam Patterson, now hold the several offices as above designated, except that the last named defendant has received a commission to become the Secretary of the Banking Board under the new law hereinafter described, but has not yet entered upon the performance of his duties; and the plaintiffs aver that the matter in controversy exceeds the sum and value of Two Thousand ($2,000) Dol-
6 lars exclusive of interest and costs, and that the controversy herein is one arising under the Constitution of The United States in that it deprives plaintiffs and each and all of them of rights guaranteed to them under the Constitution of the United States, and deprives them of property in violation of the Constitution of the United States, and impairs the obligation of contracts in violation of the Constitution of the United States as hereinafter more particularly set forth.

I.

That on and prior to the matters hereinafter complained of there existed in the State of Nebraska a law enacted in 1895, amended in 1903 and in 1905, which said act was entitled: "An Act to establish a State Banking Board, to define and designate state banks and to regulate said state banks, whether commercial or savings; to provide for a secretary of the state banking board and state bank examiners, and define their duties and provide for their compensation; to require corporations, partnerships, firms and individuals transacting a banking business to make reports and statements under oath to the State Banking Board and publish the same, of all their resources and liabilities; to provide for the examination of the affairs of all state banks; to fix a minimum capital; to provide for the issuing of charters by the Banking Board; to provide for the appointment of receivers; to make it unlawful for insolvent state banks to receive deposits, and to provide for penalties to fix the liability of stockholders in banking corporations in this state and providing for enforcement of such liability; to provide penalty for banks and bank officers, directors, clerk or employés making false statements,
7 entries and representations and falsifying books of such banks; to make it unlawful for officers, directors or employés to borrow the funds of the bank, except under certain conditions, and to provide a penalty; to provide a penalty for failure of banks to make reports and statements required, and to repeal Chapter 37, Session Laws 1889, entitled 'Banking,' and all other acts and parts of acts inconsistent with this act."

By section 1 of said act the Auditor of Public Accounts, the State Treasurer and the Attorney General were made and constituted the State Banking Board, and as such Banking Board were to have general supervision over and control of "any and all corporations, partnerships, firms and individuals transacting a banking business under the laws of this state."

By Section 2 of said Act "every corporation, partnership, firm or individual, transacting a banking business under the laws of and

within this state, shall be subject to the provisions of this Act, and regulated by the State Banking Board."

II.

By Section 5 of said Act it is provided that:

"Every bank, corporation, partnership, firm or individual, transacting a banking business under the laws of this state, shall within sixty days after the taking effect of this act file with the State Banking Board a full, complete and detailed report, as provided for in Section 9 of this Act, and it shall be the duty of the State Banking Board, upon examination of the report, and the approval of the same, to issue a charter signed by the chairman of the Board, and attested by its Secretary, authorizing it, they or him, to carry on and transact a banking business."

Section 6 of said Act provides, among other things, that before commencing business the said bank should file with the Banking Board a statement which shall give the name of the bank, and if incorporated, a copy of the Articles of Incorporation, and if a private bank the names of the partners, firm or individuals.

8 And by Section 7 of said Act, as amended in 1905, it is provided:

"Whenever after the examination and approval by the State Banking Board of the statement provided for in Section 6 of this Act, the corporation, partnership, firm or individual shall file with the State Banking Board the oath of the president, cashier, partner, member of the firm, or individual, that the capital stock has been paid in as provided for, and in compliance with Section 4 of this Act, then the State Banking Board * * * shall upon the payment of the sum of Twenty-five ($25.00) Dollars to said board, and by them paid to the State Treasurer, and by him placed in the general fund of the state. It shall then be the duty of said board, without unnecessary delay, to issue to said corporation, partnership, firm or individual a charter for the same purpose, and in the same manner as in Section 5. On receipt of said charter the proposed bank may begin to transact a banking business."

III.

That each and all of the plaintiff banks complied with the several provisions of the said Banking Law and severally received from the Banking Board a charter to transact a banking business as provided for in Sections 5 and 7 of said Act, and now are, and for a considerable time past have been, engaged in transacting a banking business in the State of Nebraska under and by virtue of the powers in them severally vested under the said Banking Law, and under the charters issued and granted to them severally by the said Banking Board under the said law.

That the blank copy of the form of charter issued to the said several plaintiffs, authorizing them to transact a banking business, is hereto attached as Exhibit "A" and made a part hereof. And the plaintiffs jointly and severally aver that they each severally made application to the said Banking Board for the said charter, and for

the said right to transact a banking business under the banking laws of the State of Nebraska then existing, and relying thereon, and so relying thereon invested their property, money and capital in said banking business by them severally conducted and
9 carried on, and ever that under the said law the said charters so issued to them respectively became a binding contract between the state of Nebraska and these plaintiffs severally, and ever that the Act of the Legislature of the State of Nebraska of 1909, hereinafter referred to, impairs the obligation of the said contract and is in violation of Section 10 of Article 1 of the Constitution of the United States.

And these plaintiffs severally aver that at the time when they received their several charters and entered upon the transaction of a banking business thereunder, the then existing laws of the state of Nebraska did not contain any of the provisions or obligations, regulations or prohibitions, hereinafter complained of, incorporated in the Banking Act hereinafter described.

IV.

On or about the 25th day of March, A. D. 1909, the Legislature of the State of Nebraska, passed an Act, approved by the Governor March 25th, 1909, entitled:

"An Act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation, repealing Chapter Eight (8) of the Compiled Statutes of Nebraska of 1907, and all acts and parts of acts inconsistent herewith."

By Section 1 of said Act the business of banking is "declared to be a *quasi-public* business."

In Section 2 of said Act it is provided: "It shall be unlawful for any corporation, partnership, firm or individual, to engage in or transact a banking business within this state on and after the taking effect of this Act except by means of a corporation, duly organized for such purpose under the laws of this state"; and that it is made unlawful for a corporation to transact a banking business
10 until it shall have complied with the provisions of said Act, and any violation of the provisions of said Act shall subject "the corporation, partnership, firm or individual so offending, to a penalty of $25.00 for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business."

By Section 5 of said Act it is provided that the Governor, who shall be ex officio chairman, the Auditor of Public Accounts and the Attorney General, are created the State Banking Board, which shall have general supervision and control of banks and banking under the laws of this state, "and no person or persons shall be permitted to engage in or transact a banking business save corporations having complied with the provisions of this Act. * * * Said board shall be and constitute the State Banking Board, and successor to the state banking board as now existing, as such entitled to all the records, books, files and papers thereof, and shall exercise all the

powers and discharge all the duties of such Board under the laws of this state."

V.

That at the date of the passage and approval of the said law there existed in the state of Nebraska the following private banks: The Culbertson Bank, at Culbertson; The State Bank of Elkhorn, at Elkhorn; The Hubbell Bank, at Hubbell; The Bank of Commerce, at Louisville; The Madrid Exchange Bank, at Madrid; The Bank of Norden, at Norden; The Scroggin & Co. Bank at Oak; The Farmers and Mechanics' Bank, at Oakland; The Bank of A. E. Wells & Co., at Oakland; The Bank of Dixon County, at Ponca; The Bank of Ragan, at Ragan; The Republican City Bank, at Republican City; The Farmers' State Bank, at Wabash, each of which
11 were authorized and empowered to do a banking business with charters to them severally granted under the provisions of the existing banking law.

That by the terms of the said new banking law each and singular of the said private banks are compelled to go out of business as private banks, and are prohibited continuing to do business as private banks, and are subjected to penalties for each day they shall attempt to continue to do business; and that the newly created Banking Board is without power or authority to grant them a permit to do business as private banks, and that the several members of the newly created Banking Board mean and intend, and have so declared that they would enforce each and singular of the provisions of the new banking law as against each and singular of the said private banks, and would proceed to take possession of the books, property and assets of the said private banking houses, and wind up their affairs as in said Act is provided for; and that the said Banking Act by its terms deprives the said private banks of their natural and inherent right to conduct a banking business, and deprives them of their property invested in their banking business without due process of law, and without compensation, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and of Section 1 of Article 1, and of Section 3 of Article 1 of the Constitution of the State of Nebraska, and deprives them of their contract right under the charters granted to them severally by the existing Banking Board of the state of Nebraska under the existing law of the State of Nebraska, wherein and whereby the said law impairs the obligation of the contract existing between said banks and the State of Nebraska, in violation of Section
10 of Article 1 of the Constitution of the United States, and
12 in violation of Sections 16 and 21 of Article 1 of the Constitution of the State of Nebraska, and by reason whereof said Banking Law is unconstitutional and void.

That the state is without right or authority, and the Banking Board, pretending to act under the law, is without right or authority to require the said private bankers to transfer their banking business to corporations; and that the exercise of such authority would be as to each of said private banks in violation of each and singular

of the Constitutional provisions last above referred to. And that to require the said private bankers to discontinue their said business, or to have their affairs wound up by a receiver, would result in loss and damage to each and singular of said banks, a sum in excess of $2000.00, exclusive of interest and costs.

And these plaintiffs further aver that there was not and is not any provision in the charter granted to the said Banking Companies, or in the Banking Act of 1895, or the Constitution of the State of Nebraska, or any Act of the Legislature of the State of Nebraska, in existence at the time the several charters were issued, reserving to the state of Nebraska the right to cancel and terminate the said contract right of the plaintiff banks to continue the transacting of a banking business, nor to require of the said banks or any of them to cancel or surrender the said charters granted to them respectively, nor any reservation of any right in the state of Nebraska to cancel, modify, change or alter the said charters, or to require of the said banking companies that they shall discontinue the business of banking.

13 VI.

By Section 11 of said Act of 1909, it is provided:

"It shall be unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business in this state without having first obtained a charter from the State Banking Board in the manner hereinafter provided, which charter shall issue only to corporations duly organized for the transaction of such business."

It is proposed, intended and declared by the persons composing the Banking Board under the new law, to wit, the defendants, Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, and William T. Thompson, Attorney General of the State of Nebraska, to supersede the existing Banking Board, and to take possession of all the books and papers belonging thereto, and to prohibit each and singular of the incorporated banks under the laws of the State of Nebraska, including the plaintiffs, to longer continue in the banking business unless they, each and all, shall first apply to and obtain from the newly created banking board a charter, and which said charter shall only be issued to corporations organized for the transaction of banking business, whereas each and singular of the plaintiff banks now have a charter issued to them under the laws of the State of Nebraska, authorizing them to do a banking business; and that to require each of the said banks to apply to and first obtain from the newly created Banking Board under the new law a charter to further continue the banking business, is intended to be in effect an acceptance upon the part of each and singular of said banks, of all and singular of the obligations of the new banking law heretofore complained of, as well as the obligations hereinafter to be complained of, and would result in depriving each and singular of the said banks of property rights without due process of law, and without compensation, in violation of Section 1 of Article 14 of the Amend-

ments to the Constitution of the United States which pro-
14 vides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in violation of Sections 1 and 3 of Article 1 of the Constitution of the state of Nebraska, which provide that: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, and the pursuit of happiness." * * * "No person shall be deprived of life, liberty or property, without due process of law," and would impair the obligations of the contract existing between the state of Nebraska and each of said banks, in violation of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall make any law impairing the obligations of contracts, and in violation of Section 16 of Article 1 of the Constitution of the State of Nebraska, which provides that the Legislature shall not have power to pass any "law impairing the obligation of contracts."

And in this connection these plaintiffs further aver that there was and is no provision in the Banking Act of 1895, under which the charters were issued to the said banking companies, nor in the Constitution of the State of Nebraska, nor in any statute of the state of Nebraska then in existence, reserving to the state of Nebraska the right to cancel, modify, change or terminate the said charters granted to the said banks, nor to require of the said banks to surrender their said charters, nor to make application for or to receive new charters under any new or subsequent banking law under the direction of any newly created Banking Board, and that to do so would
15 be in violation of the provisions of the Constitution of the United States, and of the Constitution of the State of Nebraska, heretofore in this paragraph referred to.

VII.

To more effectually require of each and singular of the state banks to accept of the terms and conditions of the said banking law, it is provided in Section 14 that each and singular of said banking corporation shall, within sixty days after the taking effect of the Act, file with the said State Banking Board a report, giving the name of the bank, a copy of the Articles of Incorporation, the names of the stockholders, its location, the nature of the banking business, the amount of paid up capital stock, as provided in Section 15 of the Act, and that said report is to be examined by the Banking Board, and "if satisfied that such corporation meets the requirements of this Act, to issue to said banking corporation a certificate stating that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the depositors' guarantee fund of the State of Nebraska, "and by reason whereof each and singular of the plaintiff banks, and all banking corporations of the state of Nebraska, shall be required to accept of the provisions of the said Act, and to com-

ply with each and singular of the guarantee provisions relating to the guarantee fund hereinafter referred to before they shall be entitled to have or receive the said certificate entitling them to continue to do a banking business, and all of which is in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and of Sections 1 anad 3 of Article 1 of the Constitution of the state of Nebraska, heretofore quoted, and im-
16 pairs the obligation of the contracts existing between the State of Nebraska, and said banking companies severally, in violation of Section 10, Article 1 of the Constitution of the United States and of Section 16 of Article 1 of the Constitution of the State of Nebraska, heretofore quoted.

VIII.

It is provided in Section 20 of said Act that any banking corporation which shall transac[illegible] banking business without first having obtained a charter therefor, as provided for in Section 11 referred to supra, and a certificate as provided for in Section 14 of this Act, shall be subjected to a fine or penalty of $50.00 per day for each day it shall so transact banking business, and by said Section 20 it is made the duty of the Attorney General to enforce the said fine or penalty in said section provided for, and that by reason whereof each and singular of the plaintiff banks, and other banking corporations of the State of Nebraska, are required and compelled to apply to the said Banking Board for a new charter and for a new certificate to do business, and to comply with the guarantee fund hereinafter referred to, or otherwise subject themselves to the said fine or penalty of $50.00 per day; and that it is the purpose and declared intent of the Attorney General to enforce said penalties, and that if the said plaintiff banks and like banks of the State of Nebraska shall not accept of and comply with the said Section of said Act, they will be deprived of their property right to transaest a banking business, in violation of the Constitution of the United States and of the State of Nebraska, and of contract rights
existing between them and the State of Nebraska under their
17 existing charters and franchises to transact a banking business, and by reason whereof the said section of the said Act is in violation of Section 1 of Article 14 of the Constitution of the United States, and of Sections 1 and 3 of Article 1 of the Constitution of the State of Nebraska, heretofore quoted, and is in violation of Section 10 of Article 1 of the Constitution of the United States, and of Section 16 of Article 1 of the Constitution of the State of Nebraska, heretofore quoted.

IX.

By Section 44 of the said Act it is provided that every banking corporation shall be subject to an assessment for the purpose of providing a guarantee fund for the protection of depositors in banks.

By Section 45 it is further provided that within thirty days after the taking effect of said Act, and on the 1st day of December, 1909, and on the 1st day of June and December in each year thereafter,

each banking corporation shall make a report to the Banking Board, showing the average daily deposits for the preceding six months, and that on the 1st day of the next month succeeding the said Banking Board shall levy assessment against the capital stock of each of said banking corporations, to wit, within sixty days after taking effect of the Act, one-fourth of one per cent. of the average daily deposits; on the 1st day of January, 1910, one-fourth of one per cent. of the average daily deposits; on the 1st day of July, 1910, one-fourth of one per cent. of the average daily deposits; on the 1st day of January, 1911, one-fourth of one per cent. of the average daily deposits; and on the 1st day of July and January of each year thereaftor one-twentieth of one per cent. of the average daily deposits, and provides that any person making any oath to any
18 false statement as to the amount of said deposits by any bank, shall be guilty of a felony, and punished by a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the penitentiary for a term of not less than one or more than five years, or both, in the discretion of the court.

As soon as said assessments are levied, the banking corporations against which the same are levied, shall set apart, keep and maintain, in their said banks, the amounts thus levied against them, which amounts "shall be and constitute what shall be designated as a depositor's guarantee fund, payable to the State Banking Board on demand for the uses and purposes hereinafter provided."

By Section 47 of the Act it is further provided that if the depositor's guarantee fund shall, from any cause, prior to July 1st, 1910, be depleted or reduced to an amount less than one-half of one per cent. of the average daily deposits, "as shown by the last semi-annual assessment against the capital stock of the corporations governed by the provisions of this Act, a special assessment shall be made for an amount not exceeding one per cent. of said average daily deposits in any one year."

In Section 52 it is provided that in the event of the insolvency of a bank, and the same shall pass into the hands of a receiver, "if the cash in the hands of the receiver, available for such purposes, be insufficient to pay the claims of the depositors, the court in which the receivership is pending, or a Judge thereof, shall determine the amount required to supply the deficiency, and cause the same to be certified to the State Banking Board, which shall thereupon draw against the depositor's guarantee fund in the amount re-
19 quired to supply such deficiency, and shall forthwith transmit the same to the receiver to be applied on the said claims of depositors."

"Such drafts against the depositor's guarantee fund shall be prorated as nearly as may be among the several solvent banks wherein the same is so as aforesaid kept and maintained, and in accordance with the amounts thereof held by such banks respectively."

That under and by virtue of said provisions, the said guarantee fund assessed against the capital stock of each of said banks is to become a general fund to be appropriated by the Banking Board to the payment of claims of depositors in any bank that may fail or

become insolvent, by which each and singular of the plaintiff banks, and all the banks of the state, are made to contribute out of their assets the sums of money to be assessed against them, not for the payment of their own liabilities, but for the payment of liabilities of some other bank or banks.

That the amount of each of said assessments upon the average deposits of the banks of the state of Nebraska will amount to the sum of $182,485.75, and that the gross amount of said assessments specifically provided for in Section 45, as above stated, will amount to the sum of $766,440.15, and that the gross amount of said assessments upon each of the plaintiff banks will exceed the sum of $2,000, exclusive of interest and costs. These plaintiffs aver that the said sections of said Act in this paragraph mentioned are in violation of the Constitution of the United States, and in violation of the Constitution of the State of Nebraska, in that they operate to unlawfully take the property of each of the plaintiff banks, and of each of the banks of the State of Nebraska, without compensation, and appropriate the same to the payment of the private debts and obligations of other banking companies, and all without due
20 process of law, and in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and in violation of Section 1 and Section 3 of Article 1 of the Constitution of the State of Nebraska, and operate to impair the contract obligations existing between the several stockholders in said banking corporations and the State of Nebraska, by increasing the contract obligations which the purchasers of said stock assumed as such stockholders in violation of Section 10 of Article 1 of the Constitution of the United States and of Sections 16 and 21 of Article 1 of the Constitution of the State of Nebraska.

X.

It is provided in Section 52 of said Act that the claims of depositors for deposits and claims of holders of exchange shall have priority over all other claims, except federal, state, county and municipal taxes, and shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due, including the liability of stockholders, and upon proof thereof shall be paid immediately out of the available cash in the hands of the receiver.

That by virtue of said provision the claims of other creditors of such bank are postponed until after the payment in full of the claims of depositors, and of holders of exchange, and that in the event the claims of depositors and of exchange shall exhaust the assets of the bank, other creditors are entirely excluded from any share in the assets, and are thereby deprived of the right to enforce or collect their claims or any part thereof, and by reason whereof the said section impairs the obligations of the contract rights of such persons, firms or corporations, as shall extend or give credit to such banking company, or such as may have supplied the place of
21 business for such banking company, or the furniture or bank fixtures to enable it to transact business as a banking com-

pany, and all in violation of the rights of such creditors, and in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and of Sections 1 and 3 of Article 1 of the Constitution of the State of Nebraska, and of Section 10 of Article 1 of the Constitution of the United States, and of Sections 16 and 21 of Article 1 of the Constitution of the State of Nebraska.

XI.

It is provided in Section 6 of this Act that the Governor shall appoint a secretary at a salary of $3000 per year, and a clerk, who shall receive a salary of $1500 per year, and Bank Examiners; and it is provided in Section 9 of said Act that said Bank examiners shall receive the sum of $1800 per year and expenses not exceeding $1000 per year, and that every bank examined shall pay to the State Treasurer for credit of general fund, within ten days after the completion of such examination, the sums of money in Section 9 of said Act provided, to wit:

"For banks with a capital of fifteen thousand ($15,000) dollars or less, Fifteen ($15) dollars; for banks with a capital of more than fifteen thousand ($15,000) dollars and less than fifty thousand ($50,000) Dollars, Twenty ($20) Dollars; for banks with a capital of fifty thousand ($50,000) Dollars and less than one hundred fifty thousand ($150,000) Dollars, Thirty ($30) Dollars; and for banks with one hundred fifty thousand ($150,000) dollars or more, fifty ($50) Dollars."

It being the intent and purpose of the law that the sums of money so to be paid by the said banks to the State Treasurer for the credit of general fund, shall be used to pay the salaries of the said officers last above named, which said officers are officers of the state, and by reason thereof the said banks are required to contribute sums of money to the general fund of the state of Nebraska sufficient in and of themselves to pay the salaries of the state officers last above named in this paragraph.

22 It is further provided in Section 60 that the said Banking Board is authorized and empowered to offer and pay out of the depositor's guaranty fund rewards for the apprehension and conviction of any person or persons violating the provisions of this Act, such reward not to exceed in any case $500. By the terms of said section said money so appropriated out of the guaranty fund for rewards, is not confined to the apprehension and conviction of any person or persons actually engaged in banking business, or in the conducting of any bank, but applies to and includes any person or persons whomsoever, who may have violated any of the provisions of said Act. The said provisions above referred to result in an appropriation of the funds of the banks to the payment of the salaries of the State Officers in this chapter of the brief named, and an appropriation of the guaranty fund for the prosecution of persons who may have committed a criminal offense against the state, and that the legislature is without power or authority to take and appropriate any part of the moneys or assets of the said banks for the payment of the salaries of State Officers, or for the payment of re-

wards in connection with a public prosecution of violators of the law, and that by reason of the premises the said sections of the Act, to wit, Sections 6 and 9 and 60 are unconstitutional and void, being in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and in violation of Sections 1 and 3 of Article 1, and Section 21 of Article 1 of the Constitution of the State of Nebraska, and in violation of Section 10 of Article 1 of the Constitution of the United States, and is in violation of Section 19 of Article 3 of the Constitution of the State of Nebraska, in this: that said Section 60 of said Act authorizes the State Banking Board to make an appropriation of the said money in the said
23 section provided for, whereas said Section 19 of Article 3 of the Constitution provides: "Each legislature shall make appropriation for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each House, and shall not exceed the amount of revenue authorized by law to be raised in such time. Bills making appropriations for the pay of members and officers of the Legislature, and for the salaries of the officers of the Government, shall contain no provision on any other subject."

Plaintiffs further aver that the defendant, Ashton C. Shallenberger, as Governor, under the proviso in Section 6 of said Act, has issued a commission to the defendant, Sam Patterson, effective July 2nd, 1909, appointing him Secretary of the Banking Board created by the said Act, and that the said Sam Patterson as such appointed secretary means, intends and threatens, and will, unless restrained by the order of this court, enter into the office of existing Secretary of the Banking Board and take possession of the books and papers of the said office of existing Secretary, Ed. Royse, and will deprive and dispossess the defendant, Ed. Royse, of the possession of said books and papers of his said office, and that the newly created Banking Board, under this law, propose, mean, intend and threaten to assist the said Sam Patterson in taking possession of the said books, and papers of the said office, and that the newly created Banking Board under the said Act, to wit, the defendants, Ashton C. Shallenberger, Governor, Silas R. Barton, Auditor of Public Accounts, and William T. Thompson, Attorney General,
24 mean, propose, intend and threaten that they will, on the morning of the 2nd day of July, 1909, take possession of the office of the existing Banking Board and take possession of all the books, papers and documents relating thereto, unless restrained by the order of this court.

XII.

These plaintiffs further aver that all the Sections of the said Act hereinbefore referred to, and complained of, as being in violation of the provisions of the Constitution of the United States and the provisions of the Constitution of the State of Nebraska, hereinbefore specifically mentioned, are material and essential parts of the said

act, and without which the said Act would not have been passed by the legislature, nor approved by the Governor of this state; and that by reason of the premises the entire Act is null and void and in violation of the provisions of the Constitution of the United States hereinbefore referred to, and is in violation of the provisions of the Constitution of the State of Nebraska, hereinbefore referred to.

A copy of the said Act is hereto attached as exhibit "B" and made a part hereof.

These plaintiffs further aver that the purpose and scope of the said Act was and is to extend the credit of the State of Nebraska to individual banks, and more particularly to banks which in and of themselves are not entitled to equal credit with other banks in the State of Nebraska, and thereby enabling banks which in and of themselves are not entitled to equal credit with other banks, to have their credit so extended and enlarged as to induce citizens and inhabitants of the State of Nebraska to become depositors thereof; and all of which is in violation of Section 3 of Article 12 of the Constitution of the state of Nebraska, which provides: "The
25 credit of the state shall never be given or loaned in aid of any individual, association or corporation."

These plaintiffs further aver that it is claimed on and in behalf of the defendants, Ashton C. Shallenberger, Governor, Silas R. Barton, Auditor of Public Accounts, and William T. Thompson, Attorney General, who under the said Act are created the Banking Board, that the said Act goes into effect on the morning of July 2nd, 1909, and that they threaten and intend on the morning of July 2nd, 1909, to take possession of the office of the Banking Board, and of the books and papers belonging thereto, and to enter upon the discharge of their duties as such newly created Banking Board, and will proceed to do so unless enjoined and restrained by the order of this court.

They further declare, intend and threaten that as such Banking Board they will immediately, under the provisions of said Act, require the immediate suspension of Banking Business by the private bankers of the state of Nebraska, including the private bankers plaintiffs herein, and will proceed to the appointment of receivers to wind up the affairs of said banks, to the destruction, confiscation and damage of the property and assets of the said banks, unless restrained by the order of this court, and that they will, under the provisions of said Act, require each and all of the banking houses of the State of Nebraska, including the plaintiff banks herein, to make application to the newly created Banking Board for the issue by the said Banking Board to the said Banks, respectively, of a new charter, under the provisions of the said Act, and the surrender and cancellation of their charters which they now hold, have and possess to transact a banking business under the existing laws of the state of Nebraska, unless restrained by the order or injunction of this court, and that said newly created banking board will proceed
26 to require the said banks, including the plaintiff banks herein, to make the reports to the said Banking Board, as provided in the said Act, and to accept from the Banking Board a

certificate which shall recite that said banks have complied with the guaranty provisions in the said law, otherwise that they shall discontinue the banking business, and which things the said Board will proceed to do unless enjoined and restrained by the order of this court; and that said Banking Board will proceed to make the assessment under the guaranty provisions of the said Act, for the creation of a guaranty fund, as therein provided for, and to appropriate the said moneys as in said Act provided for, unless restrained and enjoined by the order of this court, all of which things will produce immediate and irreparable damage to these plaintiffs, and that these plaintiffs are without any adequate remedy at law in the premises.

Wherefore plaintiffs pray your Honors for the granting of an immediate restraining order, enjoining the defendants, Ashton C. Shallenberger, Governor, Silas R. Barton, Auditor of Public Accounts, and William T. Thompson, Attorney General, from proceeding to act as a Banking Board under the said law of the Legislature of Nebraska approved March 25th, 1909, and that they be enjoined and restrained from taking possession of books and papers of the Banking Board, and be enjoined and restrained from interfering with these plaintiffs, or any of them, in the conducting of their banking business under the present laws of the state of Nebraska, and under their present charters issued to them under the laws of the State of Nebraska, and that they be further restrained and enjoined from enforcing any of the provisions of said Banking Act approved March 25th, 1909, and that the defendant,
27 Sam Patterson, be enjoined and restrained from attempting to exercise any powers or rights under the commission of the Governor of Nebraska, appointing him Secretary of the said Banking Board; and enjoined and restrained from taking possession of the books and papers of the present Secretary of the Banking Board, and from in any manner doing or performing any Act under the said commission.

And further pray, that upon the final hearing herein it shall be adjudged and determined that the said Banking Act approved March 25th, 1909, be adjudged and decreed to be unconstitutional, null and void, as being in violation of the provisions of the Constitution of the United States and of the Constitution of the State of Nebraska, for the reasons in that behalf in the bill of complaint set forth.

May it please Your Honors to grant unto these plaintiffs a writ of subpœna of the United States of America, directed to Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, L. G. Brian, State Treasurer of the State of Nebraska, William T. Thompson, Attorney General of the State of Nebraska, Ed Royse, Secretary State Banking Board and Sam Patterson, commanding them that on a certain day, and under a certain penalty therein to be specified, personally to be and appear in this Honorable Court, then and there to make full, true and complete answer to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide by such order and decree herein as this

Honorable court shall deem meet and agreeable to equity and good conscience.

JOHN LEE WEBSTER,
Solicitor for Complainants.

WILLIAM V. ALLEN,
Of Counsel.

28 STATE OF NEBRASKA,
Douglas County, ss:

John L. Webster, being first duly sworn, on oath deposes and says: That he is one of the solicitors for the complainants herein, and that each and all of said plaintiffs are absent from Douglas County, State of Nebraska, and that all of said complainants except two are corporations; that this affiant has read the foregoing bill of complaint and knows the contents thereof, and that the allegations thereof are true, except as to such matters as are therein stated upon information and belief, and as to such matters he believes the same to be true.

JOHN L. WEBSTER.

Subscribed and sworn to before me, Ida M. Walters, a Notary Public in and for Douglas County, State of Nebraska, this 19th day of June, 1909.

[NOTARIAL SEAL.] IDA M. WALTERS,
Notary Public.

Com. Exp. Jan. 11, 1910.

29 EXHIBIT "A."

State of Nebraska.

Charter

State Banking Board.

Number —. Lincoln —.

Be it known: that it has been made to appear to the State Banking Board of the State of Nebraska on the part —— —— in the — of —— County of —— and state of Nebraska, that said —— —— ha- complied with the requirements of the laws of said state as made and provided for the establishment and government of Banks, and is thereby entitled to the privilege of transacting a banking business, therefore

By these Presents I, —— —— Chairman of the State Banking Board, hereby certify that said —— —— is authorized to transact the business of a — Bank in accordance with the provisions of the Banking Act of the State of Nebraska and other laws pertaining thereto, beginning on or after ——.

In Testimony Whereof, I have hereunto set my hand and caused

to be affixed the Seal of the State Banking Board. Done at Lincoln this — day of ——, in the year of our Lord one thousand nine hundred and — of the Independence of the United States the one hundred and — and of this State the —.

——— ———,
Chairman State Banking Board.

Attest:

——— ———,
Secretary State Banking Board.

30 EXHIBIT "B."

House Roll No. 423.

An Act for the Regulation, Supervision and Control of the Business of Banking, and to Provide Penalties for its Violation, Repealing Chapter Eight (8) of the Compiled Statutes of Nebraska of 1907, and All Acts and Parts of Acts Inconsistent Herewith.

Be it enacted by the Legislature of the State of Nebraska:

SECTION 1. The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, pass-book or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debt; and the loaning of money upon personal or other security, is hereby declared to be a quasi-public business and subject to regulation and control by the state.

SEC. 2. It shall be unlawful for any corporation, partnership, firm or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by means of a corporation duly organized for such purpose under the laws of this state. It shall be unlawful for any corporation to receive money upon deposit or transact a banking business under the laws of this state until said corporation shall have complied with all the provisions and requirements of this act. Any violation of the provisions of this section shall subject the corporation, partnership, firm or individual so offending to a penalty of twenty-five ($25.00) dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business.

31 SEC. 3. The term "bank" or "banking corporation" as used in this act, shall be construed to mean any incorporated banking institution which shall have been incorporated under the laws of this state as they existed prior to the taking effect of this act, and to such banking institutions as shall hereafter become incorporated under the provisions of this act. The term "commercial bank" shall be construed to mean any such banking institution as shall, in addition to the exercise of other powers, follow the practice of repaying deposits upon check, draft, or order, and of making commercial loans chiefly; the term "savings bank" shall be construed to mean any such banking institutions as shall, in addition to the exercise of

other powers, follow the practice of repaying deposits only upon the presentation of pass-books, and whose loans are chiefly made on real estate security.

SEC. 4. The term "lawful money" as used in this act shall be construed to mean all coin, United States notes, treasury notes, gold certificates, silver certificates, national bank notes, and all other forms of money issued by or which may hereafter be issued by or under the authority of the United States as a circulating medium, and shall also be construed to mean any form of certificate which is now or may hereafter be declared to be lawful money of the United States.

SEC. 5. There is hereby created a State Banking Board which shall consist of the following state officers: The Governor, who shall be ex-officio chairman thereof; The Auditor of Public Accounts and the Attorney General, a majority of whom shall constitute a quorum for the transaction of business. Said board shall have general supervision and control of banks and banking under the laws of this state and no person or persons shall be permitted to engage in or
32 transact a banking business save corporations having complied with the provisions of this act. Provided, however, that this act is not intended to apply to banks organized under the banking laws of the United States. Said board shall be and constitute the state banking board, and successor to the state banking board as now existing, as such entitled to all the records, books, files and papers thereof, and shall exercise all the powers and discharge all the duties of such board under the laws of this State.

SEC. 6. The Governor shall appoint a secretary of the said Banking Board, who shall be an elector of the State, and who, at the time of his appointment, shall have had, at least, three years' practical experience in actual banking, and who shall receive a salary of Three thousand dollars ($3000.00) per year, and a clerk of said Board, who shall receive a salary of Fifteen hundred dollars ($1500.00) per year, and who shall be a competent book-keeper and an expert accountant and one other assistant if necessary who shall hold their respective offices at the pleasure of the Governor, and perform the duties hereinafter enjoined upon them, and such other duties as usually devolve upon such offices. The Governor shall also appoint a suitable person, or persons, having had at least, three years' actual experience in practical banking, to make an examination of and into the affairs of every corporation transacting a banking business and subject to the provisions of this act, as often as shall be deemed necessary or proper by the said State Banking Board, and at least twice in each year. But no person thus appointed shall be permitted to examine the affairs of any bank in which he has a personal interest, or of which he is, or within one year next preceding his appointment was an officer or em-
33 ployee, and any and all persons appointed under the provisions of this Section shall be subject to removal at the pleasure of the Governor. Said bank examiners so appointed shall perform all the duties and exercise all the functions of bank examiners under the laws of this State. Such secretary and bank

examiners shall each enter into a bond, to the State of Nebraska, before taking their respective offices, with surety or sureties to be approved by the Governor, the Secretary's to be in the sum of $25,000.00 and each Examiner's in the sum of $25,000.00.

SEC. 7. The said Banking Board shall procure and keep a seal, upon which shall be engraved the coat of arms of the State and the words "State Banking Board of Nebraska" and all charters and orders issued by said Board shall be attested by said seal and the signatures of the said chairman and secretary.

SEC. 8. Any bank examiner so appointed shall have power to make a thorough examination into all the books, papers and affairs of any corporation, transacting a banking business in this State, and, in so doing, to administer oaths and affirmations, and to examine on oath or affirmation the officers, agents, and clerks of such corporation, touching the matter which they may be authorized and directed to inquire into and examine, and to summon, and by attachment compel the attendance of any person or persons in this state to testify under oath before them in relation to the affairs of such corporation. The person or persons making such examination shall make a full and detailed report of the condition of such corporation, to the State Banking Board. Provided, that any examiner appointed under the provisions of this act who shall knowingly and wilfully make any false or fraudulent report of the condition of any bank which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank, in continuing to operate an insolvent bank; or if any such examiner shall receive or accept any bribe or gratuity, given for the
34 purpose of inducing him to not file any report of an examination of any bank made by him, or who shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned in the State Penitentiary for not less than two, nor more than ten years. Provided, further, that such bank examination shall be in the presence of at least two of the Board of Directors of the bank undergoing said examination, and it shall be the duty of the examiner to incorporate in his report herein referred to, the names of the directors in whose presence the examination was made, and such examination shall include at least annually a verification from sources outside of said bank of at least ten per cent in number of the deposits and loans.

SEC. 9. Every person thus appointed to examine into the affairs of banking corporations, shall receive as compensation for his services at the rate of Eighteen Hundred ($1800) Dollars per annum and all necessary traveling expenses incurred and actually paid out in the performance of his duties as such examiner, not to exceed One Thousand ($1,000) Dollars per annum, such traveling expenses to be paid out of the general fund, upon his filing with the State Auditor an itemized report of such expenses approved by the State Banking Board, or any two members thereof. Every bank thus examined shall pay to the State Treasurer, for credit of general

fund, within ten days after the completion of such examination, the following fees:

For banks with a capital of Fifteen Thousand ($15,000) Dollars or less, Fifteen ($15) Dollars; for banks with a capital of more than Fifteen Thousand ($15,000) Dollars and less than Fifty Thousand ($50,000) Dollars, Twenty ($20) Dollars; for
35 banks with a capital of Fifty Thousand ($50,000) Dollars and less than One Hundred Fifty Thousand ($150,000) Dollars, Thirty ($30) Dollars; and for banks with One Hundred Fifty Thousand ($150,000) Dollars or more, Fifty ($50) Dollars, provided that not more than two such fees shall be paid in any one calendar year. The examiner shall report to the State Treasurer and State Banking Board within five days from the completion of examination, the date thereof and the amount of fee due. Every person appointed as such examiner shall make, at the end of every year, to the State Banking Board a detailed report under oath, of all fees reported by him under this act, and of all his necessary traveling expenses in the performance of his duties as such examiner; and shall give a bond in the sum of Twenty-five Thousand ($25,000) Dollars, executed by himself with one surety where such surety is an incorporated surety company authorized by the laws of this State to transact such business and with at least two sufficient sureties where such sureties are natural persons, to be approved by the Governor, conditioned for the faithful performance of his duties as such examiner.

SEC. 10. Any duly qualified bank examiner appointed as aforesaid shall have authority when ordered by the State Banking Board to take possession of any bank doing business under the laws of this state, and to retain possession of such bank for a time sufficient to make a thorough examination into its affairs and financial condition and if, upon such examination, it be found by said examiner, that said bank is insolvent, or is conducting its business in an unsafe or unauthorized manner, or is endangering the interest of its depositors, then such examiner shall have full power and authority to hold
and retain possession of all the money, rights, credits, assets,
36 and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken by such examiner, until the State Banking Board can receive and act on the report made by the examiner of said bank, and have a receiver appointed as hereinafter provided.

SEC. 11. It shall be unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business in this state without having first obtained a charter from the State Banking Board in the manner hereinafter provided, which charter shall issue only to corporations duly organized for the transaction of such business.

SEC. 12. A majority of the members of the Board of Directors of any banking corporation transacting business under the provisions of this act must be residents of the county wherein such bank is located, or of the counties immediately adjacent thereto, and

every director of a bank having a capital of fifty thousand dollars ($50,000.00) or less, must be the owner and holder of at least four per cent of the paid-up capital stock in his own name and right, and in a bank with a capital of more than fifty thousand dollars ($50,000.00) every director must own and hold in his own name and right not less than three thousand dollars ($3,000.00) of the paidup capital stock. Provided, however, that the provisions of this Section shall not apply to banks operating at the taking effect of this act. Provided, however, that the ownership of five shares of the capital stock of a savings bank shall qualify the owner to be elected as a director of such bank.

SEC. 13. The paid up capital stock required, to entitle a corporation to a charter under the provisions of this act, shall be as follows:

37 In no case less than ten thousand dollars; where the bank is located in a village or town of more than one hundred and less than five hundred inhabitants, not less than fifteen thousand dollars; in towns or villages of five hundred or more, and less than one thousand inhabitants, not less than twenty thousand dollars; in towns or villages of one thousand or more, and less than two thousand inhabitants, not less than twenty-five thousand dollars; in cities or villages of two thousand or more, and less than five thousand inhabitants, not less than thirty-five thousand dollars; in cities of five thousand or more, and less than twenty-five thousand inhabitants, not less than fifty thousand dollars; in cities of twenty-five thousand or more, and less than one hundred thousand inhabitants, not less than one hundred thousand dollars; in cities of one hundred thousand or more inhabitants, not less than two hundred thousand dollars. Provided, however, that the minimum paid up capital of a savings bank shall be fifteen thousand dollars ($15,000). Where a savings bank is located in a city of more than fifty thousand (50,000) and less than one hundred thousand (100,000) inhabitants, the paid up capital shall be not less than thirty-five thousand dollars ($35,000). In cities of one hundred thousand (100,000) or more inhabitants, the paid up capital of savings banks shall be not less than seventy-five thousand dollars ($75,000), and such paid in capital, including the initial and subsequent payments, shall consist, at the time, of lawful money, credit with depository banks, to be approved by the State Banking Board, national, State, county or municipal bonds, bank furniture and the necessary bank buliding, and the lot or lots upon which such building is situated which said lot or lots shall be free from incumbrance; but national, state, county and municipal bonds shall not constitute, in the aggregate, more than one-half, nor the bank building and the lot or lots upon which it is situated, together with the bank furniture and fixtures more than one-

38 third of the paid in capital, nor shall such furniture and fixtures constitute more than one-tenth thereof. Provided, however, that the provisions of this section shall not apply to banking corporations organized and engaged in the business of banking at and prior to the taking of this act.

SEC. 14. Every corporation transacting a banking business under the laws of this state, shall, within sixty days after the taking effect of this act, file with the State Banking Board, a full, complete and detailed report of its condition, as provided for in Section 15 of this act, and it shall be the duty of the State Banking Board upon examination of the report and approval of the same, if satisfied that such corporation meets the requirements of this act, to issue to said banking corporation, a certificate stating that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the depositors' guarantee fund of the state of Nebraska. Every banking corporation receiving such certificate shall conspicuously display the same in its place of business and said banking corporation may print or engrave upon its stationery and advertising matter, words to the effect that its depositors are protected by the depositors' guarantee fund of the state of Nebraska. The printing or engraving of a false statement of the fact last before this named, is hereby declared to be a violation of the provisions of this act.

SEC. 15. Every corporation, organized for and desiring to transact a banking business, shall before commencing such business, make under oath, and transmit to the State Banking Board, a full, complete, and detailed statement of: First, the name of the proposed bank; Second, a certified copy of the articles of incorporation; Third, the names of the stockholders; Fourth, the county, city, town
39 or village in which the said proposed bank is located; Fifth, the nature of proposed banking business, whether commercial or savings; Sixth, the amount of paid-up capital stock, and the items of money and property included in said amount.

SEC. 16. Whenever, after the examination and approval by the State Banking Board, of the statement provided for in Section 15 of this act, the corporation shall file with the State Banking Board the oath of the President, or cashier, that the capital stock has been paid in as provided for, and in compliance with Section 13 of this act, then the State Banking Board, if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility shall, upon the payment of certain fees as hereinafter provided, issue to said corporation the certificate provided for in Section 14 and a charter to transact the business provided for in its articles of incorporation.

The fees for such charters to engage in the business of banking shall be as follows: For banks having a capital of twenty-five thousand dollars ($25,000) or less, the fee shall be twenty-five dollars ($25); for banks having a capital of twenty-five thousand dollars ($25,000) up to and including fifty thousand dollars ($50,000) the fee shall be twenty-five dollars ($25) and fifty cent ($.50) for each additional thousand above twenty-five thousand dollars ($25,000); for banks having a capital in excess of fifty thousand dollars ($50,000) the fee shall be thirty-seven and fifty one-hundredths dollars ($37.50) and twenty-five cents ($.25) for each additional thousand above fifty thousand dollars ($50,000). The above fees shall be paid to the State Banking Board and by them paid to the State Treasurer

who shall place the same in the general fund of the state. On payment of the required fees and the receipt of the charter the proposed bank may begin to transact a banking business.

40 SEC. 17. Every corporation transacting a banking business hereunder shall make to the state Banking Board not less than four (4) reports during each year according to the form which may be prescribed by said Board, which reports shall be verified by the oath or affirmation of the president, vice-president or cashier, and in addition two of the Board of Directors. But the officer administering the oath or affirmation to the person verifying such report shall be in no way interested in such bank as an officer, director or stockholder.

SEC. 18. The reports provided for in Section 17 of this act shall state the amount loaned upon bonds and mortgages; the amount loaned upon notes, bills of exchange, overdrafts, and other personal securities, with the actual market value of such securities; the amount of rediscounts and of commercial paper past due; the amount invested in real estate, giving the cost of the same; the amount of cash on hand and on deposit in banks or trust companies with their names and the amount deposited in each; the amount of all other assets not enumerated above, and such other information as the State Banking Board may require. Provided, that commercial paper not in process of collection, six months past due, and demand paper carried one year with interest unpaid, shall not be included in the report of the assets of such corporation. Each report shall state such resources and liabilities at the close of business on any past day by the State Banking Board specified and shall be transmitted to said Board within five days after the receipt of a request or requisition therefor. And a summary of such report in the form prescribed by the State Banking Board shall be published in the place where such banking business is transacted, or if there is no newspaper in the place, then in one published in the same county, at the expense of such bank; and proof of such publication shall be transmitted to the State Banking Board within twenty

41 (20) days from the date fixed for such report.

SEC. 19. Any corporation transacting a banking business under this act, shall be required to furnish such special reports as may be required from the State Banking Board, or the chairman thereof, to enable such board or chairman to obtain full and complete knowledge of the condition of such corporation.

SEC. 20. Any corporation, that shall fail, neglect or refuse to make or furnish any report, or any published statement required by the provisions of this act, or that shall transact a banking business without having first obtained a charter therefor, and the certificate provided for in section 14 of this act, in accordance with the provisions of this act, shall be subject to a fine or penalty of fifty dollars ($50) per day for each day after the time named for said report or statement to be made, that it delays to make and transmit such report or statement to the State Banking Board; and for each day on which any such corporation shall be engaged in transacting a banking business in violation of the provisions of this act. The

fine or penalty herein provided for shall be recovered by the state, in a civil action in any court of competent jurisdiction, and it is hereby made the duty of the Attorney General to enforce the fine or penalty herein provided.

SEC. 21. Any person who shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any corporation transacting a banking business under this act, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person or persons authorized to examine into the affairs of any such corporation, or shall make, state or publish any false statement of the amount of the
42 assets or liabilities of any such corporation shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the state penitentiary not less than one (1) year nor more than ten (10) years.

SEC. 22. Every bank shall at all times have on hand as a reserve in available funds an amount equal to at least fifteen (15) per cent of the aggregate amount of its deposits. Two-fifths of said fifteen (15) per cent shall be cash in the vaults of the bank; provided, that in cities having a population of more than twenty-five thousand (25,000) said reserves shall be twenty (20) per cent of the aggregate amount of the deposits; two-fifths of said twenty (20) per cent shall be cash in vaults of the bank; provided further, that savings banks shall have on hand at all times as a reserve in available funds an amount equal to at least five (5) per cent of their aggregate deposits. So much of said reserve fund as is not herein required to be kept in cash in the vaults of the bank shall be kept in such depositories as may be approved by the State Banking Board.

SEC. 23. The available funds shall consist of cash on hand and balances due from other solvent banks. Cash shall include lawful money of the United States, and exchange for any clearing house association. Whenever the available funds of any bank shall fall below the reserve herein required, such bank shall not make any new loans or discount otherwise than by discounting or purchasing bills of exchange payable at sight; nor shall such banks make any dividends of its profits until it has on hand the available funds required by this act. The State Banking Board may notify any bank, in case its reserve shall fall below the amount required, or its capital is impaired, to make good such reserve, or capital within such time as the State Banking Board may direct, and any failure of such bank to make good any deficiency in the amount of
43 its reserve, or its capital, within the time directed, shall be cause for the appointment of a receiver as hereinafter provided.

SEC. 24. The aggregate amount of the rediscounts and bills payable of any corporation transacting a banking business in this State, shall at no time exceed two-thirds ($\frac{2}{3}$) of its paid-up capital except for payment of its depositors nor shall any bank other than savings banks at any time permit its loans and investments, exclusive of its reserve and banking house and fixtures, to exceed in the aggregate, eight times the amount of its capital and surplus.

SEC. 25. No corporation transacting a banking business shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, or the shares of any corporation, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and such stock so purchased or acquired shall within six (6) months from the time of its purchase be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the bank. Provided, that in no case shall the amount of stock so held, exceed ten (10) per cent of the paid-up capital of such bank.

SECTION 26. The affairs and business of any banking corporation transacting business under the laws of this state, shall be managed or controlled by a Board of Directors of not less than three and not more than fifteen members, who shall be selected from the stockholders, at such time and in such manner as may be provided by the by-laws of the corporation and in conformity with the provisions of this Act. The board shall select from among its number, the president and secretary, and shall select a cashier. Such officers shall hold their office for a term of one year and until their
44 successors are elected and qualified. The Board of Directors shall have the power to require the cashier and any or all its officers having care of the funds of the bank, to give good and sufficient bond, which bond shall run to the banking corporation, to be approved by the Board of Directors and held by the State Banking Board. The Board of Directors shall hold at least two regular meetings each year, and at such meetings, a thorough examination of the books, records, funds and securities held by the bank shall be made and recorded in detail upon its record book, and a certified copy thereof shall be forwarded to the secretary of the State Banking Board within ten days.

SEC. 27. No banking corporation transacting a banking business under this act shall pay interest on deposits directly or indirectly at a greater rate than four per cent per annum. Any officer, director or employee of a bank violating the provisions of this section directly or indirectly shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not less than one hundred ($100.00) dollars or more than five hundred dollars ($500.00), or by imprisonment in the state Penitentiary not exceeding three (3) years, or both in the discretion of the court.

SEC. 28. Any corporation transacting a banking business under this act, may semi-annually declare a dividend of so much of the net profits as it may deem expedient, but such corporation shall, before the declaration of a dividend, carry one-fifth part of its net profits to its surplus fund, until the same shall amount to twenty (20) per centum of its paid up capital stock.

SEC. 29. Any corporation transacting a banking business under this act may purchase, hold and convey real estate for the following purposes only: Such as is necessary for convenient transaction of its business, not exceeding in value one-third of the paid-up
45 capital; such as shall be conveyed to it for debts due the bank, and such as it shall purchase at sale under judgments

or decrees upon its securities, but the bank at such sale shall not bid a larger amount than to satisfy its debts. No real estate so acquired in satisfaction of debts or at a sale upon its judgments or decrees shall be held longer than five (5) years and within thirty days thereafter must be sold at private or public sale, and at no time shall the total amount of real estate held by any bank for any purpose exceed fifty (50) per cent of the paid-up capital of such bank. Savings banks shall not be subject to the provisions of this section.

SEC. 30. No corporation, transacting a banking business under this act shall accept or receive on deposit for any purpose any money, bank bills, United States Treasury notes, or currency, or other notes, bills, checks, drafts, credits or currency, when such corporation is insolvent, and if any corporation transacting a banking business under this act shall receive or accept on deposit any such deposits when said corporation is insolvent, the officer, agent or employee knowingly receiving or accepting or being accessory to, or permitting or conniving at the receiving or accepting on deposit therein or thereby any such deposit as aforesaid, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the Penitentiary not less than one year nor more than ten years.

SEC. 31. It shall be unlawful for two or more banks, transacting a banking business in the same city, town or village in this state to have or use the same name, or names so nearly alike as to cause confusion in transacting business, and in all cases where such similarity of names now exists, or may hereafter *exist*, complaint may be made to the State Banking Board, and if, in the judgment of said Board, such a similarity does exist, and does create confusion
46 in conducting the business of either or both of said banks, then said Board may require the junior bank in time of organization to so change or modify its name as to prevent such confusion, and the change of name so made shall be approved by said Banking Board.

SECTION 32. No officer other than a director, who is not an officer and no employee of any corporation transacting a banking business under this act shall be permitted to borrow any of the funds of the bank directly or indirectly, and no director of a bank shall be permitted to borrow any of the funds of the bank without first having secured the approval of the Board of Directors at a meeting thereof, the record of which shall be made and kept as part of the records of said bank. And any officer, director or employee of a corporation transacting a banking business under this act, who shall violate the provisions of this section or who shall aid, abet or assist in a violation thereof shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000) or imprisonment in the penitentiary not to exceed five (5) years, or both in the discretion of the court.

SEC. 33. No corporation transacting a banking business in this State shall directly or indirectly, loan to any single corporation, firm or individual, including in such loan all loans made to the several members or share-holders of such firm or corporation, for the use and benefit of such firm, corporation or individual, more than

twenty per cent (20%) of the paid up capital and surplus of such bank, but the discounting of bills of exchange, drawn in good faith, against actually existing values, and the discount of commercial paper actually owned by the persons negotiating the same, shall not be considered as money borrowed and in no case shall the
47 total liabilities of the several stock-holders of any bank to such bank exceed fifty per cent of the paid-in capital and surplus of such bank; any officer, director, or employee of any corporation transacting a banking business under the laws of this state, who shall violate, or knowingly permit a violation of the provisions of this section, upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00). Provided, however, that the provisions of this section shall not apply to the securities of the savings banks enumerated in Section 36 of this Act.

SEC. 34. No corporation transacting a banking business under this act shall withdraw, or permit to be withdrawn either in the form of dividends or otherwise, any part of its capital. If losses have at any time been sustained, equal to or exceeding undivided profits on hand, no dividend shall be made; and no dividend shall be made by any bank transacting a banking business under the laws of this state, to an amount greater than the net profits on hand less the losses and bad debts; Provided, however, that the capital stock may be increased or decreased, in the manner following: First, The stockholders at any regular meeting or at any special meeting duly called for such purpose shall by a vote of those owning two-thirds of the capital stock, authorize the president or cashier, to notify the State Banking Board of the proposed reduction or increase of capital and a notice containing a statement of the amount of such proposed reduction or increase of capital shall be published for four (4) weeks in some newspaper published and of general circulation in the county where such bank is located. But no reduction shall be to any amount less than the capital required by this act, and there shall be no reduction of capital or cancellation of stock, until said reduction or cancellation shall first be ap-
48 proved by the State Banking Board. Provided, that no reduction of capital or cancellation of stock, shall be made that will impair the security of the depositors, and no increase shall be authorized by the State Banking Board until a statement shall have been filed with said Board, that the proposed increase of capital, has been paid in, and said statement shall be sworn to by the president or cashier. Second, Whenever any corporation, transacting a banking business in this state shall desire to go into voluntary liquidation, they shall first obtain the written consent of the State Banking Board, who may, if they deem it advisable, before granting such request, order a special examination made of the affairs of such bank, for which the same fees may be collected as in regular examination.

SEC. 35. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing

while he remains such stockholder, and in case any person holding any stock in any banking corporation shall sell, transfer or dispose of such stock, knowing that such bank is insolvent, he shall be deemed the owner of such stock, and liable thereon the same as if such stock had not been sold, transferred or disposed of; and such liability may be enforced whenever such banking corporation shall be adjudged insolvent without regard to the probability of the assets of such insolvent bank, being sufficient to pay all of its liabilities.

SEC. 36. Any corporation, designating its business as that of a savings bank shall have power to carry on a savings bank business, as prescribed and limited in this act. Any savings bank may receive deposits from the general public, and all deposits in any bank shall be paid to depositors, or their lawful representatives when required and at such time and with such interest and under such regulations as shall be prescribed by said bank and approved by the State Banking Board, which regulations shall be printed and conspicuously posted in some place accessible and visible to all persons in the business office of said bank.

The loanable funds of any savings bank, except the reserve provided for in this act, shall be invested in bonds of the United States, or of any state of the United States, or in the public debt or bonds of any city, county, township, village or school district of any state of the United States, which shall have been authorized by the legislature of the state, or when approved by the State Banking Board in other bonds of known marketable value, or shall be loaned on negotiable paper, secured by any of the above mentioned classes of security, or upon notes or bonds secured by mortgage lien upon unincumbered real estate; Provided, That second mortgage loans may be made on improved farm lands, but no loans shall be made on such improved farm lands, or other real estate which including the aggregate amount of incumberance thereon, shall exceed fifty per cent of the cash value thereof, or upon notes secured by collateral security of known marketable value, or held as cash, or shall be deposited in good solvent banks; Provided, That chattel mortgages shall not be deemed collateral security and savings banks are hereby prohibited from investing their funds in them.

SEC. 37. A pass-book shall be issued to each depositor in a savings bank for all money deposited on an open account. Such pass book shall contain the rules and regulations adopted by such savings bank governing such deposits. In such pass books shall be entered each deposit made by, and each payment made to such depositor, and no deposit shall be received nor payment made unless in the pass book at the time such transaction is had; Provided; That nothing in this section shall prohibit a savings bank from issuing certificates for legitimate deposits; Provided, further, when any deposit is made in any savings bank by a person being a minor, the said bank may pay to such depositor such sums as may be due to him or her, and the receipt of such minor to such savings bank shall be in all respects valid in law.

SEC. 38. The President and Cashier, or the business manager, of every corporation transacting a banking business under this act shall

cause to be kept at all times a full and correct list of the names and residences of all the stock-holders in the corporation, the number of shares held by each, and the amount of paid-up capital represented by the shares held by each member. Such list shall be subject to the inspection of all stockholders and creditors of the Bank, during business hours of each day on which business may be legally transacted. Such list shall be kept in the office of the Banking corporation where its business is transacted, and where all stockholders and creditors of the association may have ready access to it. Any violation of this section shall be punishable by a fine of not less than fifty, and not more than two hundred dollars, or imprisonment in the county jail not less than thirty nor more than sixty days, or both, in the discretion of the court.

Sec. 39. It shall be unlawful for any officer or employee of any bank to certify any check drawn upon such bank, unless the person, firm or corporation drawing the check has on deposit with the bank at the time such check is certified, an amount of credit on the depositors' ledger of such bank subject to the payment of such check, equal to the amount specified in such check; but the amount
51 of such check shall not be recoverable from the payee or holder except in the case of fraud. Whenever a check drawn upon any bank is certified by any officer or employee of such bank, the amount thereof shall be immediately charged against the account of the person, firm or corporation drawing the same.

Sec. 40. Any officer or employee of any bank who shall willfully and knowingly violate any of the provisions of Sections 32 and 33 of this act, shall be personally liable under his bond for any loss to the bank resulting therefrom.

Sec. 41. Any bank, which is in good faith winding up its business for the purpose of consolidating with some other bank, may transfer its resources and liabilities to the bank with which it is in process of consolidating but no consolidation shall be made without the consent of the State Banking Board, nor shall such consolidation operate to defeat the claim of any creditor or hinder any creditor in the collection of his debt against such banks or either of them.

Sec. 42. Any bank may voluntarily liquidate by paying off all its depositors in full, and upon filing a certified statement with the State Banking Board setting forth the fact that all its liabilities have been paid, and the surrendering of its certificate of authority to transact a banking business, it shall cease to be subject to the provisions of this act; provided, that the State Banking Board shall cause an examination to be made of any such bank, for the purpose of determining that all its liabilities, except to stockholders, have been paid.

Sec. 43. Any bank may place its affairs and assets under the control of the State Banking Board by posting on its door the following notice: "This bank is in the hands of the State Banking Board." The posting of such notice, or the taking possession of any bank by the State Banking Board or by any bank examiner, shall be sufficient to place all of its assets of whatever nature, immediately in
52 the possession of the State Banking Board, and shall operate as a bar to the levying of attachments or executions thereof,

and shall operate to dissolve and release any attachment levied thereon within thirty days next preceding such action.

SEC. 44. For the purpose of providing a guaranty fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this State, shall be subject to assessment, to be levied, kept, collected and applied as hereinafter provided.

SEC. 45. Within thirty days after the taking effect of this act and on the first day of December, 1909, and on the first day of June and December of each year thereafter, every corporation engaged in banking under the provisions of this act, shall make and file with the State Banking Board a statement in writing, verified by the oath of its president, vice-president or cashier, showing the average daily deposits in its bank for the preceding six months, exclusive of public money otherwise secured. And on the first day of the month next succeeding the date fixed for the making and filing of such statement, the State Banking Board shall levy assessments against the capital stock of each of said banking corporations as follows: Within sixty days after the taking effect of this act, one fourth of one per cent of the average daily deposits, as shown by the first statement of such average daily deposits required to be made and filed by the provisions of this section; on the first day of January, 1910, one-fourth of one per cent of the average daily deposits; as shown by the statement required to be made and filed on the first day of December, 1909; on the first day of July, 1910, *and* one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of June 1910; and on the first day of January, 1911, one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of December, 1910,
53 and on the first day of July and January of each year thereafter, one-twentieth of one per cent of the average daily deposits, as shown by the statement thereof required to be made and filed next preceding such assessment. Provided, however, that any bank commencing business and receiving deposits less than six months prior to the date when the statement referred to in this section is required to be made and filed, shall show the average daily deposits for that portion of the said semi-annual period during which it has been engaged in business and receiving deposits.

Any person making oath to any of the statements herein required, knowing the same to be false, shall be deemed guilty of a felony, and be punished by a fine of not less than one hundred, nor more than one thousand dollars, or be imprisoned in the penitentiary for a term of not less than one, nor more than five years, or both, in the discretion of the court.

SEC. 45*a*. Any bank organized subsequent to the date when this act takes effect shall pay into the Depositor's Guaranty Fund four (4) per cent of the amount of the capital stock, when such bank opens for business, which amount shall constitute a credit fund, subject to adjustment on the basis of said bank's average daily deposits, as shown by the first two semi-annual statements required by section 45 of this act. The Banking Board is authorized and empowered to

make such an adjustment of the rates of assessments to be paid by any bank which engages in the banking business subsequent to the time when this act takes effect, as shall require such bank to contribute to the Depositor's Guaranty Fund, a just and equitable sum, and the State Banking Board shall adjust assessments of such bank so that the first two assessments, together with the credit fund of four (4) per cent of its capital stock paid in by said bank when it begins business, shall at least equal one (1) per cent of the average daily deposits of said bank as shown by the two first semi-annual statements required by section 45 of this act. Provided, however, that said four (4) per cent will not be required of new banks formed by the re-organization or consolidation of banks that have previously complied with the terms of this act with reference to the payment of assessments.

SEC. 46. As soon as said assessments are respectively levied, the banking corporations against which the same are levied, shall be notified of the amount of such assessment levied against them respectively, by the Secretary of the State Banking Board and said banking corporations shall thereupon set apart, keep and maintain in their said banks the amount thus levied against them and the amounts thus levied, kept and maintained shall be and constitute what shall be designated as a Depositor's Guaranty Fund, payable to the State Banking Board on demand for the uses and purposes hereinafter provided.

SEC. 47. If the Depositor's Guaranty Fund shall, form any cause, prior to July 1, 1910, be depleted or reduced to an amount less than one-half of one per cent of the average daily deposits, or subsequent to July 1, 1910, be depleted or reduced to an amount less than one per cent of the average daily deposits, as shown by the last semi-annual statements thereof filed, the State Banking Board shall levy a special assessment against the capital stock of the corporations governed by the provisions of this act, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits in any one year.

SEC. 48. Whenever it shall appear to the State Banking Board, from any examination or report provided for by this act, that the capital of any corporation transacting a banking business under this act is impaired, or that such corporation is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors, or upon the failure of such corporation to make any of the reports or statements required by the provisions of this act or to comply with the provisions of said act in all respects, the State Banking Board shall communicate the facts to the Attorney General, who shall thereupon cause an application to be made to the district court of the county where such corporation maintains its bank and is thus conducting its business, or to any Judge of such Court, for the appointment of a suitable person as receiver to take charge of the business, assets and property of every kind of said corporation and to wind up its affairs. Provided, how-

ever, that if the judge or judges of the district court of the county where such application should be made be absent therefrom at the time such application is to be made, any Judge of the Supreme Court may appoint such receiver, but all proceedings in relation to such receivership thereafter shall be had before the district court, or a Judge thereof, which might have appointed such receiver in the first instance, and the petition and the order appointing such receiver shall be forthwith transmitted to the clerk of such district court. It shall be sufficient to authorize the appointment of a receiver if any of the facts herein enumerated as a ground for the application for a receiver be made to appear.

SEC. 49. The court or judge, appointing a receiver under the provisions of this act, shall, in the order of appointment, fix the amount of his bond in an amount sufficient to protect all persons interested in the assets and affairs to be administered by such receiver, and the receiver, before entering upon his duties as such receiver, shall give a bond in the amount thus fixed, with sureties to be approved by the clerk of said court, conditioned that he will faithfully and impartially discharge such duties, and well and truly account for all money and property coming into his hands as such re-
56 ceiver, and disburse the same in conforming to the order of such court or judge, and to the provisions of this act. Upon the approval of such bond and the taking of the oath required by law, the person thus appointed shall have full power and authority, as receiver under the provisions of this act.

SEC. 50. After the State Banking Board, a bank examiner or receiver shall have taken possession of any bank under the provisions of this act, the stockholders thereof may repair its credit, restore or substitute its reserves, and otherwise place it in condition so that it is qualified to do a general banking business as before it was taken possession of as aforesaid, but such bank shall not be permitted to reopen its business until the State Banking Board, after careful investigation of its affairs is of the opinion that its stockholders have complied with the law, that the bank's credit and funds are in all respects repaired and all advances, if any, made from the Depositor's Guaranty Fund, with interest, fully paid, its reserve restored or sufficiently substituted, and that it should be permitted again to re-open for business; whereupon said State Banking Board is authorized to issue written permission for re-opening of said bank in the same manner as permission to do business is granted after the incorporation thereof, and thereupon said bank may be re-opened to do business under its charter originally granted under this act. The directors of every banking corporation transacting business under the provisions of this act shall have power and authority to levy and collect assessments on the stock of the banking corporation for the purpose of repairing and restoring the credit of said banking corporation, or to repair and restore any deficiency that may occur by reason of the impairment of the capital stock of said bank.

57 SEC. 51. As soon as a receiver, appointed under this act, has qualified, which shall be within ten days after his appointment, the court in which such proceedings are pending, or a

judge thereof shall make an order fixing the time for filing claims against the corporation whose property is under such receivership, which shall not be more than sixty days from the date of such order, and notice thereof shall be given forthwith, by posting a copy of such order on the front door of the bank and by publication thereof in some newspaper published in the county, to be designated by the court or judge making such order, for at least three successive weeks prior to the date thus fixed.

SECTION 52. The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stock-holders and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver, available for such purpose, be insufficient to pay the claims of depositors, the court in which the receivership is pending, or a judge thereof, shall determine the amount required to supply the deficiency and cause the same to be certified to the State Banking Board, which shall thereupon draw against the Depositor's Guaranty Fund in the amount required to supply such deficiency, and shall forthwith transmit the same to the receiver, to be applied on said claims of depositors. Provided, however, that no part of the Depositor's Guaranty Fund shall be used to supply the deficiency that may accrue by the failure of any bank now transacting
58 business, which bank has not filed the report provided for in Section 15, receive- the certificate provided for in Section 14 and paid the first assessment provided for in Section 45.

Such drafts against the Depositor's Guaranty Fund shall be prorated, as nearly as may be, among the several solvent banks wherein the same is so as aforesaid kept and maintained, in accordance with the amounts thereof held by such banks respectively.

SEC. 53. To the extent of the amount paid from said guaranty fund to satisfy the claims of creditors the State Banking Board for the use and benefit of said fund, shall be subrogated to all the right of the creditors thus paid, to participate in the assets of such bank and the same shall be enforced and collected by the receiver accordingly, and when collected shall be placed in said fund and deposited by the State Banking Board in the solvent banks subject to the provisions of the Depositor's Guaranty Fund, proportionate as to the several deposits to the assessments levied against each of said banks.

SEC. 54. The Court in which such proceedings are pending, or a judge thereof, shall make such other and further orders and enter such judgments as may be necessary or proper to insure a proper administration of such receivership, and a just and equitable distribution of the assets of such banking corporation among its creditors and all others entitled to participate therein, subject to the provisions of this act.

SEC. 55. Any Bank Examiner, when ordered by the State Bank-

ing Board, or any receiver appointed under the provisions hereof, for the purpose of winding up the affairs of the bank, shall have authority to take possession of any bank to which the order of appointment shall relate, and retain the possession of such bank, its moneys, rights, credits and property of every description, as against
59 any mesne or final process issued by any court against such bank the property of which has been thus taken by such examiner or receiver, and until such time as all of the liabilities of such bank have been fully paid and discharged, and any attachment lien against such property, acquired within thirty days next preceding the taking of such possession by such examiner or receiver as aforesaid, shall be thereby released and dissolved. For each and every day the State Bank Examiner shall so hold possession, such bank shall pay to the State Treasurer, for account of the general fund, a fee of Ten ($10.00) dollars, and for each and every day a receiver shall so hold possession, such bank shall pay such receiver as full compensation for his services a fee of not less than three dollars nor more than ten dollars as may be fixed by the State Banking Board, and in each case, in addition to said amount the necessary clerk hire and attorney fees.

SEC. 56. Whenever any bank refuses or neglects to deliver possession of its affairs, assets or property of whatever nature, to the State Banking Board, or to the person ordered or appointed to take charge of such bank according to the provisions of this act, the State Banking Board shall communicate the facts to the attorney general, or to the county attorney of the county wherein such bank is located, who shall thereupon cause an application to be made to the District court or to any judge thereof, having jurisdiction of the same, for an order placing such Board, or the person ordered or appointed by it to take charge of such bank, in charge of such bank and its affairs and property; provided, that if the judge of the district court having jurisdiction of the same, shall be absent therefrom at the time such application is to be made, then, and in that case, any judge of the supreme court may grant such order, but the petition and order of possession shall be forthwith transmitted to the clerk of the district court of the county in which such bank is located.

60 SEC. 57. Every receiver of a bank appointed under the provisions of this act, shall, immediately upon taking possession of such bank, proceed to collect all debts, assets and claims belonging to such bank, and, upon order of the district court or judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such bank upon such terms as the court or judge thereof may direct; and may, if necessary, enforce the liabilities of stockholders, officers or directors to such bank; provided, that bad or doubtful debts, as used in this section shall not include the liability of stockholders, officers or directors; and whenever any such receiver shall have paid in full all of the liabilities of such bank, including any liability to the Depositor's Guaranty Fund as herein provided, the funds and assets remaining in his hands, if any, shall be paid and delivered to the party or parties entitled thereto.

SEC. 58. Every receiver appointed under the provisions of this act, shall make — the State Banking Board, not less than one report monthly according to such form as may be prescribed and which shall be verified by his oath.

SEC. 59. The State Banking Board shall prescribe all such forms as may be useful or necessary in carrying out the provisions of this act, and shall have power to make such rules and regulations, not inconsistent with the provisions of this act, as may be necessary or proper to carry it into effect according to its true intent.

SEC. 60. For the purpose of carrying out the provisions of this act, the State Banking Board is hereby authorized and empowered to offer and pay out of the Depositor's Guaranty Fund rewards for the apprehension and conviction of any person or persons violating the provisions of this act. Such rewards not to exceed in any case five hundred ($500.00) dollars.

61 SEC. 61. Where no other punishment is provided herein, any person violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five, nor more than three hundred ($300.00) dollars, or by imprisonment in the county jail for not less than thirty, nor more than ninety days, or both in the discretion of the court.

SEC. 62. Chapter Eight (8) of the Compiled Statutes of Nebraska, of 1907, and all acts and parts of acts inconsistent herewith are hereby repealed.

SEC. 63. Nothing in this act contained repealing any act for the regulation or conduct of banking, shall be construed to release any person from punishment for any acts heretofore committed violating said act or acts, nor effect in any manner any existing indictment or prosecution by reason of such repeal; and for that purpose such act or acts shall continue in full force and effect notwithstanding such repeal.

C. W. POOL,
Speaker of House of Representatives.

Attest:

TRENMOR CONE,
Chief Clerk of House of Representatives.

GEORGE W. TIBBETS,
President of Senate.

Attest:

WILLIAM H. SMITH,
Secretary of Senate.

Approved March 25th, 1909.

ASHTON C. SHALLENBERGER, *Governor.*

62 STATE OF NEBRASKA, *ss:*

I Trenmor Cone, Chief Clerk House of Representatives, hereby certify that the within Bill originated in the House and passed the

Legislature thirty first Session on the twenty second day of March 1909.

TRENMOR CONE,
Chief Clerk House of Representatives.

Received March 25-1909.

GEO. C. JUNKIN,
Sec'y State.

Indorsed: Compilation of the Banking Laws of the State of Nebraska 1909. E. Royse, Secretary of the State Banking Board.

The foregoing Bill, in Equity, bears indorsements as follows: 5—B. United States Circuit Court, District of Nebraska. The First State Bank, of Holstein, Nebraska, et al., Plaintiffs, vs. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. In Equity. Filed Jun- 21, 1909. Geo. H. Thummel, Clerk, By J. H. McClay Deputy A. D. John L. Webster and William V. Allen, Solicitors for Complainants.

63 *Chancery Subpœna, with Marshal's Returns.*

Filed June 28, 1909.

(Original.)

UNITED STATES OF AMERICA,
District of Nebraska, Lincoln Division:

The President of the United States of America to Ashton C. Shallenberger, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of the State of Nebraska; L. G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Ed. Royse, Secretary State Banking Board, and Sam Patterson, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States for the District of Nebraska, on the first Monday of August next, at the city of Lincoln, then and there to answer the Bill of Complaint of The First State Bank, of Holstein, Nebraska; The Bank of Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank, of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank, of Denton, Nebraska; The Farmers and Merchants Bank, of Malmo, Nebraska; The Farmers and Merchants Bank, of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of

F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank, of Howells, Nebraska; The Saline County Bank, of Western, Nebraska; The Bank of
64 Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank, of Fairmont, Nebraska; The Exchange Bank, of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank, of Gordon, Nebraska; The Northwestern State Bank, of Hay Springs, Nebraska; The Bank of Danbury, of Danbury, Nebraska; The Morrill State Bank, of Morrill, Nebraska; The Banking House of A. Castetter, of Blair, Nebraska; The Farmers State Bank, of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers State Bank, of Orchard, Nebraska; The Brunswick Bank, of Brunswick, Nebraska; The Farmers and Traders Bank, of Wakefield, Nebraska; The Elkhorn Valley Bank, of Tilden, Nebraska; The Laurel State Bank, of Laurel, Nebraska; The Belden Bank, of Belden, Nebraska; The Farmers State Bank, of Laurel, Nebraska; The Citizens State Bank, of Battlecreek, Nebraska; The Citizens State Bank, of Petersburg, Nebraska; The Inman State Bank, of Inman, Nebraska; The Emmet State Bank, of Emmet, Nebraska; The Elgin State Bank, of Elgin Nebraska; The Atlas Bank, of Neligh, Nebraska; The Oakdale Bank, of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank, of Royal, Nebraska; The Citizens Bank, of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska, and The Republican City Bank, of Republican City, Nebraska; this day filed against you, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of June, 1909. Issued at my office in the city of Lincoln, under the Seal of said Circuit Court, the day and year last aforesaid.

GEO. H. THUMMEL, *Clerk.*
By J. H. McCLAY, *Deputy.*

MEMORANDUM.—The above named defendants to enter their appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

GEO. H. THUMMEL, *Clerk,*
By J. H. McCLAY, *Deputy.*

JOHN LEE WEBSTER.
Omaha, Neb., and
WILLIAM V. ALLEN, *Madison,*
Complainants' Solicitors

65 Indorsed: No. 5, Doc. B. Marshal's Doc. No. 3297. United States Circuit Court, District of Nebraska. Lincoln Division. The First State Bank, of Holstein, Nebraska, et al., vs. Ashton C. Shallenberger, Governor of the State of Nebraska, et al.

Chancery Subpœna. (Original.) Returnable to Aug. Rules, 1909. Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay Deputy. A. D. John Lee Webster and William V. Allen, Complainants' Solicitor-. Rec'd at Marshal's office 6/23/1909. Handed Deputy 6/23/1909. Marshal's Costs. Service, 12.00. Mileage, 11.40. Total, $23.40.

Marshal's Return, Attached to Chancery Subpœna.

Return on Service of Writ.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named Ashton C. Shallenberger, Governor of the State of Nebraska, L. G. Brian, State Treasurer of the State of Nebraska, William T. Thompson, Attorney General of the State of Nebraska, Ed. Royse, Secretary State Banking Board, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, by handing to and leaving a true and correct copy thereof with each of them personally at Lincoln, Lancaster County in said District on the 24th day of June, A. D. 1909.

WM. P. WARNER,
U. S. Marshal,
By CLAUDE P. HENSEL, *Deputy.*

Indorsed: Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

66 *Return of Marshal Attached to Chancery Subpœna.*

United States Marshal's Office,

District of Nebraska.

I hereby certify and return, that I received the within writ on the 24th day of June, 1909, and personally served the same on the 25th day of June, 1909, on Sam Patterson by delivering to and leaving with Mrs. Sam Patterson, (his wife) an adult person, who is a member or resident in the family of Sam Patterson, said defendant named therein, at Arapahoe, County of Furnas, in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Sam Patterson, one of said defendants herein.

WM. P. WARNER,
U. S. Marshal,
By CLAUDE P. HENSEL, *Deputy.*

Indorsed: Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

67 *Notice of Hearing on Application for Temporary Injunction.*

Filed June 28, 1909. Geo. H. Thummel, Clerk. By J. H. McClay, Dep.

United States Circuit Court, District of Nebraska.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, and FIFTY-ONE OTHER BANKS, Plaintiffs,

vs.

ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of the State of Nebraska; L. G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Ed. Royse, Secretary State Banking Board, and Sam Patterson, Defendants.

Notice.

To the Defendants:

You are hereby notified that the plaintiffs will, on the 28th day of June, 1909, at 11 o'clock A. M., or as soon thereafter as parties can be heard, make application before the United States Circuit Court, at the Federal Court House at the city of Lincoln, state of Nebraska, for an injunction as prayed in the bill of complaint, a copy of which is served herewith.

JNO. L. WEBSTER,
Solicitor for Complainants.

68 *Marshal's Return Attached to Foregoing Notice.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 22 day of June, 1909 I received this notice, and on the 22 day of June, 1909, I served the same upon the within-named defendant L. G. Brian State Treasurer of the State of Nebraska at Lincoln in Lancaster County, State, and District of Nebraska, by leaving a true copy thereof, with all the indorsements thereon, at the usual place of residence of said defendant, with an adult person and resident in the family of said defendant. And at the same time and place, in the same manner and on the same party I served a copy of the Bill of Complaint in this case.

WM. P. WARNER,
United States Marshal for the District of Nebraska.
By J. H. PROCTOR,
Deputy United States Marshal.

Indorsed: Filed June 28, 1909. Geo. H. Thummel, Cl'k. J. H. McClay, Dep. Filed Jun- 28, 1909. Geo. H. Thummel, Clerk. By J. H. McClay, Deputy.

Marshal's Return Attached to Foregoing Notice.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 22 day of June 1909, I received this Notice, and on the 22 day of June 1909, I served the same upon the within-named Ashton C. Shallenberger Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, William T. Thompson Attorney General of the State of Nebraska and Ed Royse Secretary of the
69 State Banking Board, at Lincoln in Lancaster County, State and District of Nebraska, by delivering to and leaving with each of them a true copy thereof, with all the indorsements thereon. And at the same time and place in the same manner and on the same parties I served a copy of the Bill of Complaint in this case.

WM. P. WARNER,
United States Marshal for the District of Nebraska,
By J. H. PROCTOR,
Deputy United States Marshal.

Indorsed: Filed June 28" 1909. Geo. H. Thummel, Cl'k. By J. H. McClay, Dep. Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

Marshal's Return Attached to Foregoing Notice.

United States Marshal's Office.

District of Nebraska.

I hereby certify and return, that I received the within writ on the 24th day of June, 1909, and personally served the same on the 25th day of June, 1909, on Sam Patterson by delivering to and leaving with Mrs. Sam Patterson, (his wife) an adult person who is a member or resident in the family of Sam Patterson, said defendant named therein, at Arapahoe, County of Furnas, in said District, an attested copy thereof, at the dwelling house or usual place of abode of said Sam Patterson, one of said defendants herein, and at the same time and place of service, and in the same manner, I served a copy of the bill of complaint.

70

WM. P. WARNER,
U. S. Marshal,
By CLAUDE P. HENSEL, *Deputy.*

Indorsed: Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. Return of service of bill of complaint. Filed June 28" 1909. Geo. H. Thummel, Cl'k. By J. H. McClay, Dep.

Indorsements on Notice of Hearing.

5—B. In Circuit Court. First State Bank of Holstein, Neb., et al., v. Ashton C. Shallenberger, Governor, etc., et al. Filed Jun-28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. A. D. Notice of Hearing on Application for Temporary Injunction. Marshal's Costs. Service $24.00. Mileage 3.30. Total $27.30. #3297. Rec'd at Marshal's office 6/22/1909. Handed Deputy 6/22/1909. Mailed Deputy 6/24/1909.

71 *Objections to Granting of Restraining Order and Motion to Dismiss.*

Filed June 28, 1909.

In the Circuit Court of the United States, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN and FIFTY-ONE OTHER BANKS, Plaintiffs,

vs.

ASHTON C. SHALLENBERGER, Governor of the State of Nebraska et al., Defendants.

The defendants in this suit severally object to the granting of any restraining order, or injunction, herein, and move the court to dismiss this suit, for the following reasons:

1. Because the said plaintiffs have not in and by their bill of complaint made or stated any cause of action which entitles them to a restraining order, temporary injunction or any equitable relief whatever.

2. Because it appears from the bill itself that if plaintiffs have any cause of complaint, they have a complete and adequate remedy at law.

3. Because several different corporations and individuals are joined as plaintiffs who have no joint interest in the subject-matter mentioned in the bill, and several parties are improperly joined as plaintiffs in the bill.

72 4. Because it does not appear from the bill that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $2,000.

5. Because it appears from the bill that the court has not jurisdiction in this suit to grant a restraining order, injunction or the relief, or any part thereof, prayed in the bill.

For the above and other reasons apparent on the face of the bill, these defendants each and severally object and protest against the granting of any restraining order or injunction, and move the court to dismiss this suit.

CHAS. O. WHEDON,
I. L. ALBERT,
Attorneys for Defendants.

W. T. THOMPSON,
Attorney General,
Of Counsel.

Indorsed: 5—B. The First State Bank of Holstein, et al. vs. Ashton C. Shallenberger, Governor, &c., et al. Objections to granting of Restraining Order & Motion to dismiss. Filed Jun- 28, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. A. D.

73 *Motion to Add Parties Plaintiff and Order Sustaining Said Motion.*

Filed June 29, 1909.

In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

Case No. 5, Docket B.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Plaintiffs,
vs.
ASHTON C. SHALLENBERGER, Governor of the State of Nebraska et al., Defendants.

Motion.

Now come The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, and move the court that they may be made parties plaintiff in the above entitled cause.

JNO. L. WEBSTTR,
WILLIAM V. ALLEN,
Attorneys.

Order.

It is hereby ordered that the motion of the American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, to be made parties plaintiff in the above entitled cause, be, and the same is hereby granted; and that their names may be added to the original petition by interlineation.

June 29, 1909.

WILLIS VAN DEVANTER,
Circuit Judge.
THOS. C. MUNGER, *Judge.*

Indorsed: United States Circuit Court of Nebraska, Lincoln Division. Case No. 5, Doc. B. The First State Bank of Holstein, Nebraska, et al. Plaintiffs, vs. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. Motion. Order. Filed Jun- 29, 1909. Geo. H. Thummel, Clerk. By J. H. McClay, Deputy. A. D. Journal.

74 *Demurrer to Bill of Complaint.*

Filed June 29, 1909.

In the Circuit Court of the United States, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN and FIFTY-ONE OTHER BANKS, Plaintiffs,

vs.

ASHTON C. SHALLENBERGER, Governor of the State of Nebraska, et al., Defendants.

Demurrer.

The defendants in said cause severally, by protestation, not confessing or acknowledging all, or any of the matters and things in said plaintiffs' bill to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for a cause of demurrer show,

First. That the said plaintiffs have not in and by said bill made or stated any such cause as does or ought to entitle them, or any of them, to the relief prayed.

Second. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit, in consequence of the want of proper and necessary averment as to the amount in controversy in this suit.

Third. Because it appears from the face of said bill that there is a misjoinder of parties plaintiff, and because it appears from the face of said bill that several parties having different and diverse interests are improperly joined as plaintiffs in said bill.

Wherefore, and for divers good causes of demurrer appearing in said bill, these defendants demur thereto and humbly demand the judgment of this court whether they, or any of them shall be compelled to make any further or other answer to said bill, and
75 pray to be hence dismissed with their costs and charges.

CHAS. O. WHEDON,
I. L. ALBERT,
Attorneys for Defendants.
W. T. THOMPSON,
Attorney General,
Of Counsel.

STATE AND DISTRICT OF NEBRASKA,
Lancaster County, ss:

Ashton C. Shallenberger on oath says that he is one of the defendants named in the above entitled action, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

ASHTON C. SHALLENBERGER.

Signed in my presence and sworn to before me this 26th day of June, 1909.

[NOTARIAL SEAL.]

T. W. SMITH,
Notary Public.

Commission expires April 17, 1915.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. T. THOMPSON,
Of Counsel for Defendants.

Indorsed: No. 5 Doc. B. First State Bank of Holstein, et al., vs. Ashton C. Shallenberger, et al. Demurrer. Filed Jun- 29, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. A. D.

76 *Temporary Injunction and Restraining Order.*

Filed June 30, 1909.

United States Circuit Court, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA; THE BANK OF Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank of Denton, Nebraska; The Farmers and Merchants Bank of Malmo, Nebraska; The Farmers and Merchants Bank of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank of Howells, Nebraska; The Saline County Bank of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank of Fairmont, Nebraska; The Exchange Bank of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank of Gordon, Nebraska; The Northwestern State Bank of Hay Springs, Nebraska; The Bank of Danbury, of Danbury, Nebraska; The Morrill State Bank of Morrill, Nebraska; The Banking House of A. Castetter of Blair, Nebraska; The Farmers State Bank of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers State Bank of Orchard, Nebraska; The Brunswick Bank, of Brunswick, Nebraska; The Farmers and Traders Bank of Wakefield, Nebraska; The Elkhorn Valley Bank of Tilden, Nebraska; The Laurel State Bank of Laurel, Nebraska; The Belden Bank of Belden, Nebraska; The Farmers State Bank of Laurel, Nebraska; The Citizens State Bank of Battlecreek, Nebraska; The Citizens State Bank of Peters-

burg, Nebraska; The Inman State Bank of Inman, Nebraska; The Emmet State Bank of Emmet, Nebraska; The Elgin State Bank of Elgin, Nebraska; The Atlas Bank of Neligh, Nebraska; The Oakdale Bank of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank of Royal, Nebraska; The Citizens Bank of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska; The Republican City Bank, of Republican City, Nebraska; The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, Plaintiffs,

vs.

77 ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of the State of Nebraska; L. G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Ed. Royse, Secretary State Banking Board, and Sam Patterson, Defendants.

Order.

Whereas, in the above entitled cause, the complainants have asked for a preliminary writ of injunction and restraining order, as prayed in the bill of complaint, and the same having come on to be heard on the application of the complainants, and upon the objections filed thereto by the defendants, and the said cause having been orally argued to the Court by the solicitors for the respective parties, and the Court being advised in the premises,

It is hereby ordered, That a temporary injunction issue, enjoining and restraining the defendants, Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, and William T. Thompson, Attorney General of the State of Nebraska, from proceeding to act as a Banking Board under a statute enacted by the Legislature of Nebraska, approved March 25th, 1909, entitled: "An Act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation, repealing Chapter 8 of the Compiled Statutes of Nebraska of 1907 and all acts and parts of acts inconsistent herewith."

And that they, the said defendants, be, and are hereby further enjoined and restrained from taking possession of the books and papers of the present Banking Board of the State of Ne-
78 braska; and that they, the said defendants, be, and hereby are enjoined and restrained from interfering with any of the plaintiff banks, under said statute of 1909.

And that they, the said Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, and William T. Thompson, Attorney General of the State of Nebraska, and persons acting under them, or any of them, be restrained and enjoined from enforcing any of the provisions of said banking act approved March 25th, 1909, above referred to.

And that the said defendant, Sam Patterson, be, and he is hereby enjoined and restrained from attempting to exercise any powers or rights under any commission of the Governor of Nebraska, appointing him to the office of Secretary of the said Banking Board, created under the said banking act, approved March 25th, 1909, and that the said defendant, Sam Patterson, be further enjoined and restrained from taking possession of any of the books and papers of the present Secretary of the Banking Board, and from in any manner doing or performing any act under the said commission.

This temporary injunction and restraining order to remain and continue in force until the further order of the Court in the premises.

WILLIS VAN DEVANTER,
Circuit Judge.

THOS. C. MUNGER,
District Judge.

June 30, 1909.

Indorsed: In the United States Circuit Court, District of Nebraska, Lincoln Division. Case No. 5, Doc. B. The First State Bank of Holstein, Nebraska, et al., Plaintiffs, vs. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. Order. Filed Jun- 30, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. A. D. Journal.

79 *Order That Case Be Submitted for Final Decree Upon Bill of Complaint and Demurrer.*

Filed June 30, 1909.

United States Circuit Court, District of Nebraska, Lincoln Division.

Case No. 5, Doc. B.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Plaintiffs,
vs.
ASHTON C. SHALLENBERGER, Governor of the State of Nebraska, et al., Defendants.

Order.

This cause coming on to be heard on the bill of complaint of the complainants, and upon the demurrer filed thereto by the defendants, and counsel for the respective parties consenting thereto, it is ordered

That this cause, be, and the same is hereby submitted to the Court for final decree upon the said bill of complaint of the complainants, and the said demurrer, and that the same is taken under consideration by the Court.

WILLIS VAN DEVANTER,
Circuit Judge.

THOS. C. MUNGER,
District Judge.

June 30, 1909.

Indorsed: No. 5, Doc. B. Order. Filed Jun- 30, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. A. D. Journal.

80 *Memorandum Opinion.*

Filed Oct. 16, 1909.

In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Plaintiffs,
v.
ASHTON C. SHALLENBERGER, Governor of the State of Nebraska, et al., Defendants.

On Demurrer to Complainant's Bill.

Mr. John L. Webster and Mr. William V. Allen for Complainants
Mr. W. T. Thompson, Attorney General, Mr. Charles O. Whedon, and Mr. I. L. Albert for Defendants.

Syllabus.

1. Constitutional Law—Due Process of Law—Banking—Restricting Business to Corporations—Guaranty Fund.

The Nebraska act of March 25, 1909, (Laws Neb. 1909, ch. 10, p. 66), which prohibits individuals from engaging in the banking business, unless they do so through the agency of a corporation, and which also conditions the right to engage in that business in that form upon the making of enforced contributions from time to time to a depositors' guaranty fund to be employed in the payment of the claims of depositors of any bank which shall become insolvent, is in conflict with Section 1 of the 14th Amendment to the Constitution of the United States which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," and is in conflict with section 3 of Article 1 of the Constitution of Nebraska which declares: "No person shall be deprived of life, liberty or property without due process of law," and therefore is void.

81 2. Same—Void Provision, When Inducement to Passage of Act, Renders Entire Act Invalid.

The provisions of the Nebraska act of March 25, 1909, *supra*, which prohibit individuals from engaging in the banking business, unless they do so through the agency of a corporation, and also condition the right to engage in that business in that form upon the making of enforced contributions from time to time to a depositors' guaranty fund to be employed in the payment of the claims of de-

positors of any bank which shall become insolvent, were the inducement to the passage of that act, and as those provisions, so coupled together, are void the entire act is thereby rendered invalid.

Before Willis Van Devanter, Circuit Judge, and Thomas C. Munger, District Judge.

THOMAS C. MUNGER, District Judge, delivered the opinion of the court.

The legislature of Nebraska passed an act relating to the conduct of the banking business within the state, by others than National banks, which was approved March 25, 1909, (Ch. 10, Laws of Neb. 1909). This act purports to be a comprehensive regulation of the business named and to repeal existing laws upon that subject. It prohibits individuals from engaging in the banking business, unless they do so through the agency of a corporation, and also conditions the right to engage in that business upon the making of enforced contributions to a separate fund, called a Depositors' Guaranty Fund, to be used for the payment of the claims of depositors of any bank organized under the state law, which shall become insolvent. The State Banking Board is given authority to draw the
82 money out of this fund to discharge the obligations of the insolvent bank to its depositors.

The complainants are certain incorporations and private individuals who were engaged in the banking business in this state, under the laws in force prior to the passage of the act in question, and the object of the bill is an injunction against the enforcement of the act. The case is submitted for final decree upon a demurrer to complainant's bill. The questions involved are whether the act violates the provisions of the Constitution of the United States, and of the Constitution of the State of Nebraska. May the legislature of Nebraska restrict to corporations formed under the laws of the state the right to engage in the banking business, and at the same time require them, as a condition of engaging or continuing in such business, to make these periodic contributions to what is called the Depositors' Guaranty Fund?

The banking business is one of the ancient and ordinary occupations, and has been and is recognized as a lawful business, not only in the State of Nebraska, but in all states of the Union, and in general, in all countries that have developed civilization and commerce. It has not been regarded as a business of such harmful tendencies, that society might entirely forbid its exercise.

Sec. 1 of the 14th Amendment to the Constitution of the United States provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," and Sec. 1 of Art. 1 of the Constitution of Nebraska declares that all persons have certain inalienable rights, and "among these are life, liberty and the pursuit

of happiness," and Sec. 3 of the same article provides that
83 "no person shall be deprived of life, liberty or property without due process of law." In the Slaughter-House Cases, 16 Wall., 36, 116, 122, speaking of that portion of the 14th Amendment to the National Constitution, Mr. Justice Bradley said:

"This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed. . . . In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property."

In the case of Allgeyer v. Louisiana, 165 U. S. 578, 589, the Court quoted with approval from these remarks of Justice Bradley, and said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

To the same effect are Butchers' Union Co. v. Crescent Co., 111 U. S. 746, 764; In the Matter of the Application of Peter Jacobs, 98 N. Y. 98, 105; The People v. Marx, 99 N. Y. 377, 386; City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707; People v. Steele, 231 Ill. 340, 83 N. E. 236; Cooley on Torts, page 277.

At common law, the business of banking was regarded as one of the lawful occupations, in which citizens might engage. In the case of Bank of California v. San Francisco, 142 California, 276, 75 Pac. 832, the Court says:

"Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and
84 no grant from the sovereign is essential to its existence. Any individual, or any number of individuals, may, under such regulations as the state, in the exercise of its police powers, may legally make, engage therein, without any grant from the state."

And in Bank of Augusta v. Earle, 13 Pet. 519, 596, it is said:

"At common law the right of banking in all its ramifications belonged to individual citizens and might be exercised by them at pleasure. . . . Undoubtedly the sovereign authority may regulate and restrain this right."

Of like import are State v. Scougal, 51 N. W. 858, 3 S. D. 57; Ex parte Pittman, (Nev.) 99 Pac. 700; 5 Cyc. 433.

By the express terms of the act in question, individuals may transact the banking business only under corporate form and management, and such corporations must also submit to the payment out of their funds of the claims of the private creditors of other banks when such banks become insolvent, although the banks required to make such payment have had no supervision or control of the acts of such insolvent bank. It is said that this requirement is not a deprivation of the property of the citizen engaged in the banking business, but is merely a reasonable regulation of the business under the police power of the State; that banks are subject to regulation by the state; and that the failure of banks to pay their depositors causes such widespread financial loss and attendant suffering, and so impairs business confidence, that the state has an especial interest in the prevention of such disasters.

It is apparent that the effect upon the community of the insolvency of banks can differ only in degree and not in kind from the effect of the insolvency of any other debtor.

In fact the failure of large railway, insurance, mercantile, or manufacturing companies may, and often does, more profoundly affect the business community than the failure of a small bank.

85 If the state possesses the power to single out a certain form of business activity and to compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate, as often as inequality of fortune may arise.

The provision relating to the Depositors' Guaranty Fund cannot be sustained on the theory that society is discharging an obligation it owes to those pauper and dependent classes who have always been regarded as proper subjects of its bounty and care. The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers, but payment is required to all depositors, whatever their financial condition may be. It is insisted that the provision in question is similar to those regulatory measures often imposed upon banking and other business interests, whereby the state lawfully imposes license fees, requires frequent examinations or inspections, designates the character of investments that may be held, prescribes the amount of capital necessary to engage in a designated business, and the like. It is sufficient to say that these and similar measures are founded on the theory that they merely require the one upon whom they are imposed, to pay the expense of inspection of his own business, and to safeguard those who deal with him.

It is entirely clear that this act of the legislature does deprive the citizen of his right to engage in a lawful business except upon the terms that the state will take of his property, without his consent, for the private use of others, and without due process of

86 law. This is not accomplished by requiring that A. shall pay directly to B. or to B.'s creditors, a certain sum of money

for the financial relief of B. or of his creditors, but the same result is effected through a process akin to taxation. It is well settled that the State cannot, under the form of taxation, take the property of its citizens and give it to build up the private fortunes of others.

In Loan Association v. Topeka, 20 Wall. 655, 663, bonds of the City of Topeka were in question, which had been voted, pursuant to an act of the legislature, to aid a manufacturing company in establishing its shops at that city. In declaring them void, the Court said:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. . . . No court, for instance, would hesitate to declare void a statute which . . . should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. . . . To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. . . . If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

It is needless to review at length the many cases which hold to the same effect. See Parkersburg v. Brown, 106 U. S. 487, 491, (bonds to aid manufacturers); Cole v. La Grange, 113 U. S. 1, 9, (bonds to aid manufacturers); Dodge v. Mission Tp., 107 Fed. 827,
87 832, (bonds to aid manufacturers); Allen v. Inhabitants, 60 Me. 124, (bonds to aid manufacturers); Coates v. Campbell, 37 Minn. 498, 35 N. W. 366, (bonds to aid manufacturers); Lowell v. Boston, 111 Mass. 454, (bonds to aid sufferers from Boston fire); Patty v. Colgan, 18 L. R. A. 744, (aid to flood sufferers); Lucas County v. State, 75 Ohio St., 114, 135, 78 N. E. 955, (Annuities for the blind); Wisconsin Keeley Institute Co. v. Milwaukee Co., 95 Wis. 153, 70 N. W. 68, (bounty to private inebriate hospital); State v. Froehlich, 118 Wis. 129, 94 N. W. 50, (bounty to private inebriate hospital); State v. Switzler, 143 Mo. 287, 45 S. W. 245, (bounty to students attending state university); Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, (aid in erection of building for Grand Army post); State v. Osawkee Tp., 14 Kan. 418, (furnishing seed grain to farmers); Deering & Co. v. Peterson, 77 N. W. 568, (appropriation to purchase seed grain for those without crops); Deal v.

Mississippi County, 18 S. W. 24, 107 Mo. 464, (bounties to growers of trees); Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 403, (taking of railway right of way for private elevator); Atchison, T. & S. F. Ry. Co. v. Campbell, 61 Kan. 439, 59 Pac. 1051, (free tickets to stock shippers); Harp v. Choctaw O. & G. Ry. Co., 119 Fed. 169, (compelling building of spur track to coal mine); Oxnard Beet Sugar Co. v. State of Nebraska, 73 Neb. 57, 66, 68, (bounty for growers of sugar beets); Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 83 N. W. 625, (bounty for growers of sugar beets); Minnesota Sugar Co. v. Iverson, 97 N. W. 455, (bounty for growers of sugar beets).

It is also apparent that the prohibition of the right to engage in the banking business by individuals, except upon the terms stated, was the inducement to the passage of this act of the legislature. Unless it be wholly void, there is no other state statute regulating the conduct of the banking business, and to assume that the legislature would have passed this act, even although not applying to individuals, implies that it would have left individual bankers free from any restraint, with liberty to operate as many banks as they chose; to receive deposits, including the public money; to operate with little or no capital; to make no reports; be subject to no examination; to pay no license fees; while subjecting corporate banks to the strictest regulation, and only allowing them to do business when possessed of fixed and large amounts of capital.

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Counsel at the argument conceded, and rightly so, as we think, that if the act could not lawfully prohibit individuals from engaging in the banking business, except upon the terms stated, the whole act must fail. In this view of the case, it has not been necessary to decide whether or not the act could be sustained as to existing banking corporations, if it were valid in other respects (See Sec. 1, Art 11*b*, Constitution of Neb.; Greenwood v. Freight Co., 105 U. S. 13; Spring Valley Water Works v. Schottler, 110 U. S. 347, 352; New York, etc., Co. v. Bristol, 151 U. S. 556, 567; Lake Shore, etc., Co. v. Smith, 173 U. S. 684, 698). Neither has it been necessary to decide whether the state, as a matter of regulation only, could restrict the business of banking to corporations, if the other restrictions, unlike the present guaranty fund provision, were all such as lawfully could be imposed upon individuals engaged in that business (See Commonwealth v. Vrooman, 164 Pa. St. 306; State ex rel. v. Woodmansee, 1 N. D. 246; State v. Scougal, 3 S. D. 55).

The act not only attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation, but also attempts to impose upon them, as a condition to their engaging in that business even in that form, a duty to make good the obligations of all other bankers in the state to their depositors.

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For the reasons before stated we are of opinion that this cannot be done consistently with the 14th Amendment to the National Constitution, or with Section 3 of Article 1 of the State Constitution, and that the act is therefore void. It follows that the demurrer must be overruled and a decree must be entered enjoining the enforcement of the act.

Indorsed: In the Circuit Court of the United States, for the District of Nebraska, Lincoln Division. Case No. 5, Doc. B. The First State Bank of Holstein, Nebraska, et al., Plaintiffs, v. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. Memorandum opinion. Filed Oct. 16, 1909. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. D. Thos. C. Munger. M. O. #22. Book 1, p. 92.

90 *Final Decree.*

Filed and Entered October 16, 1909.

In the Circuit Court of the United States for the District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, et al., Plaintiffs,
v.
ASHTON C. SHALLENBERGER, Governor of the State of Nebraska, et al., Defendants.

Final Decree.

This cause having been heretofore submitted for final decree upon the complainants' bill and the defendants' demurrer thereto, and the court being now fully advised in the premises, it is ordered that the said demurrer be, and the same hereby is, overruled; and it is also ordered and decreed that the preliminary injunction heretofore granted herein be, and the same hereby is, in all respects continued and made perpetual. And it is further ordered and decreed that the complainants recover of the defendants the formers' legal, taxable costs in the premises.

Dated October 16, 1909.

WILLIS VAN DEVANTER,
Circuit Judge.
THOS. C. MUNGER,
District Judge.

Indorsed: No. 5, Docket B. First State Bank of Holstein, Nebraska et al. v. Ashton C. Shallenberger, Governor et al. Decree. Filed Oct. 16, 1909. Geo. H. Thummel, Clerk. By J. H. McClay, Deputy. D. Journal.

91 *Petition on Appeal.*

Filed Jan. 17, 1910.

In the Circuit Court of the United States, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA; THE BANK OF Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank of Denton, Nebraska; The Farmers & Merchants Bank of Malmo, Nebraska; The Farmers & Merchants Bank of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank of Howells, Nebraska; The Saline County Bank of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank of Fairmont, Nebraska; The Exchange Bank of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank of Gordon, Nebraska; The Northwestern State Bank of Hay Springs, Nebraska; The Bank of Danbury, of Danbury Nebraska; The Morrill State Bank of Morrill, Nebraska; The Banking House of A. Castetter of Blair, Nebraska; The Farmers State Bank of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers State Bank of Orchard, Nebraska; The Brunswick Bank of Brunswick, Nebraska; The Farmers & Traders Bank of Wakefield, Nebraska; The Elkhorn Valley Bank of Tilden, Nebraska; The Laurel State Bank of Laurel, Nebraska; The Belden Bank of Belden, Nebraska; The Farmers State Bank of Laurel, Nebraska; The Citizens State Bank of Battlecreek, Nebraska; The Citizens State Bank of Petersburg, Nebraska; The Inman State Bank of Inman, Nebraska; The Emmet State Bank of Emmet, Nebraska; The Elgin State Bank of Elgin, Nebraska; The Atlas Bank of Neligh, Nebraska; The Oakdale Bank of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank of Royal, Nebraska; The Citizens Bank of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska; The Republican City Bank of Republican City, Nebraska; The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, Plaintiffs,

vs.

92 ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of

the State of Nebraska; Lawson G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Edward Royse, Secretary of State Banking Board, and Sam Patterson, Defendants.

Petition on Appeal.

The above named defendants, considering themselves aggrieved, and each considering himself aggrieved, by the decree made and entered on the 30th day of June, 1909, as also by the decree made and entered on the 16th day of October, 1909, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error, which *is* filed herewith, and they pray, and each of them prays, that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said orders were, and each of them was, made, duly authenticated, may be sent to the Supreme Court of the United States.

CHAS. O. WHEDON &
I. L. ALBERT,
Solicitors for Defendants.

Dated January 4, 1910.

Indorsed: Filed Jan. 17, 1910. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

Order Allowing Appeal.

Filed Jan. 17, 1910.

The foregoing claim of appeal is allowed.

THOMAS C. MUNGER,
U. S. Dist. Judge.

Dated Jan'y 17, 1910.

Indorsed: Filed Jan. 17, 1910. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

93 *Assignments of Error.*

Filed Jan. 17, 1910.

In the Circuit Court of the United States, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA; THE BANK OF Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Ne-

braska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank of Denton, Nebraska; The Farmers & Merchants Bank of Malmo, Nebraska; The Farmers & Merchants Bank of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank of Howells, Nebraska; The Saline County Bank of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank of Fairmont, Nebraska; The Exchange Bank of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank of Gordon, Nebraska; The Northwestern State Bank of Hay Springs, Nebraska; The Bank of Danbury, of Danbury Nebraska; The Morrill State Bank of Morrill, Nebraska; The Banking House of A. Castetter of Blair, Nebraska; The Farmers State Bank of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers State Bank of Orchard, Nebraska; The Brunswick Bank of Brunswick, Nebraska; The Farmers & Traders Bank of Wakefield, Nebraska; The Elkhorn Valley Bank of Tilden, Nebraska; The Laurel State Bank of Laurel, Nebraska; The Belden Bank of Belden, Nebraska; The Farmers State Bank of Laurel, Nebraska; The Citizens State Bank of Battlecreek, Nebraska; The Citizens State Bank of Petersburg, Nebraska; The Inman State Bank of Inman, Nebraska; The Emmet State Bank of Emmet, Nebraska; The Elgin State Bank of Elgin, Nebraska; The Atlas Bank of Neligh, Nebraska; The Oakdale Bank of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank of Royal, Nebraska; The Citizens Bank of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska; The Republican City Bank of Republican City, Nebraska; The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, Plaintiffs,

vs.

94 ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of the State of Nebraska; Lawson G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Edward Royse, Secretary State Banking Board, and Sam Patterson, Defendants.

In Equity. No. 5, Doc. B.

Assignments of Error.

Comes now the defendants, and file the following assignments of error upon which they and each of them will rely for his and their appeal from the decree made by this Honorable Court on the 16th day of October, 1909, in the above entitled cause.

The United States Circuit Court for the District of Nebraska, Lincoln Division, which entered the aforesaid decree, committed error against the just rights of said defendants, and each of them, for the following reasons:

First. In decreeing that the said complainants by their bill of complaint made and stated a cause of action which entitled them to a restraining order and temporary injunction.

Second. In decreeing that it appears from the said bill of complaint that the complainants have a cause of complaint, and that they have no adequate and complete remedy at law.

Third. In decreeing that the complainant corporations, and the individuals joined with them, have a joint interest in the subject-matter mentioned in the said bill of complaint, and that the several parties complainant are properly joined therein.

Fourth. In overruling and denying the objections to granting the restraining order and injunction prayed for in said bill of complaint, and refusing to dismiss said suit.

Fifth. In overruling and denying the demurrer of said de-
95 fendants to the complainants' said bill of complaint, and in ordering and decreeing that the preliminary order of injunction theretofore granted be, in all respects, continued and made perpetual.

Sixth. In holding and decreeing that the act of the legislature of the State of Nebraska, entitled "An Act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation, repealing Chapter eight (8) of the Compiled Statutes of Nebraska of 1907, and all acts and parts of acts inconsistent herewith," approved March 25th, 1909, is unconstitutional.

Seventh. In holding and deciding that said act of the legislature is in conflict with section 1, of the Fourteenth Amendment to the Constitution of the United States.

Eighth. In holding and deciding that said act of the legislature is in conflict with section 3, article 1, of the Constitution of the State of Nebraska.

Wherefore the said defendants pray that the said decree be reversed, and that said court may be directed to enter a decree sustaining the demurrer of said defendants to the said bill of complaint, and that said court be ordered to dismiss said bill of complaint with costs in favor of said defendants and against said complainants.

CHAS. O. WHEDON &
I. L. ALBERT,
Solicitors for the Defendants.

Indorsed: Filed Jan. 17, 1910. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy.

96

Bond for Costs on Appeal.

Filed Jan. 17, 1910.

In the Circuit Court of the United States, District of Nebraska, Lincoln Division.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA; THE BANK OF Juniata, of Juniata, Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank, of Norman, Nebraska; The First State Bank of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank, of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank, of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank of Denton, Nebraska; The Farmers & Merchants Bank of Malmo, Nebraska; The Farmers & Merchants Bank of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank of Howells, Nebraska; The Saline County Bank of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank of Fairmont, Nebraska; The Exchange Bank of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank of Gordon, Nebraska; The Northwestern State Bank of Hay Springs, Nebraska; The Bank of Danbury, of Danbury Nebraska; The Morrill State Bank of Morrill, Nebraska; The Banking House of A. Castetter of Blair, Nebraska; The Farmers State Bank of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers State Bank of Orchard, Nebraska; The Brunswick Bank of Brunswick, Nebraska; The Farmers & Traders Bank of Wakefield, Nebraska; The Elkhorn Valley Bank of Tilden, Nebraska; The Laurel State Bank of Laurel, Nebraska; The Belden Bank of Belden, Nebraska; The Farmers State Bank of Laurel, Nebraska; The Citizens State Bank of Battlecreek, Nebraska; The Citizens State Bank of Petersburg, Nebraska; The Inman State Bank of Inman, Nebraska; The Emmet State Bank of Emmet, Nebraska; The Elgin State Bank of Elgin, Nebraska; The Atlas Bank of Neligh, Nebraska; The Oakdale Bank of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank of Royal, Nebraska; The Citizens Bank of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska; The Republican City Bank of Republican City, Nebraska; The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, Plaintiffs,

vs.

97 ASHTON C. SHALLENBERGER, Governor of the State of Nebraska; Silas R. Barton, Auditor of Public Accounts of

the State of Nebraska; Lawson G. Brian, State Treasurer of the State of Nebraska; William T. Thompson, Attorney General of the State of Nebraska; Edward Royse, Secretary State Banking Board, and Sam Patterson, Defendants.

Bond for Costs on Appeal.

Know all men by these presents, that we, Ashton C. Shallenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, Lawson G. Brian, State Treasurer of the State of Nebraska, William T. Thompson, Attorney General of the State of Nebraska, Edward Royse, Secretary State Banking Board, and Sam Patterson, as principals, and The United Surety Company of Baltimore Md. as sureties, are held and firmly bound unto the above named plaintiffs in the sum of Five Hundred Dollars, to be paid to the said plaintiffs, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 15th day of January, in the year of our Lord one thousand nine hundred ten.

Whereas, the above named defendants have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit, by the Judges of the Circuit Court of the United States, for the District of Nebraska, Lincoln Division:

Now, therefore, the condition of this obligation is such, that if the above named defendants shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

98 ASHTON C. SHALLENBERGER,
Governor of Nebraska.
SILAS R. BARTON,
As Auditor of Public Accounts and ex Officio President of the Banking Board.
W. T. THOMPSON,
As Att'y Gen'l and ex Officio Member of the State Banking Board.
SAM PATTERSON.
UNITED SURETY COMPANY OF BALTIMORE, MD.
W. E. BARKLEY, JR.,
Its Attorney in Fact.

[Corporate Seal of Surety Company.]

Sealed and delivered, and taken and acknowledged, this — day of December, 1909 before me.

—— ——,
Clerk United States Circuit Court for the District of Nebraska, Lincoln Division.
By —— ——, *Deputy.*

Approved by me this 17th day of January, 1910.
THOMAS C. MUNGER,
District Judge.

Indorsed: 5—B. In the Circuit Court of the United States, District of Nebraska, Lincoln Division. First State Bank of Holstein Nebraska, et al., Plaintiffs, vs. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. Cost Bond on Appeal. Filed Jan. 17, 1910. Geo. H. Thummel, Clerk, By J. H. McClay, Deputy. M. R. 66.

99

Original Citation.

Issued January 17, 1910.

Filed January 22, 1910.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The First State Bank of Holstein, Nebraska; The Bank of Juniata, of Juniata Nebraska; The Bank of Pauline, of Pauline, Nebraska; The Norman Exchange Bank of Norman, Nebraska; The First State Bank of Beaver City, Nebraska; The State Bank of Liberty, of Liberty, Nebraska; The Atlanta State Bank of Atlanta, Nebraska; The Bank of Campbell, of Campbell, Nebraska; The Cowles State Bank of Cowles, Nebraska; The State Bank of Beaver Crossing, Beaver Crossing, Nebraska; The Denton State Bank of Denton, Nebraska; The Farmers & Merchants Bank of Malmo, Nebraska; The Farmers & Merchants Bank of Kennard, Nebraska; The Bank of Union, of Union, Nebraska; The Banking House of F. Folda, of Schuyler, Nebraska; The Bank of Rogers, of Rogers, Nebraska; The Colfax County Bank of Howells, Nebraska; The Saline County Bank of Western, Nebraska; The Bank of Waverly, of Waverly, Nebraska; The Wallace & Co., Bankers, of Exeter, Nebraska; The Farmers State Bank, of Fairmont, Nebraska; The Exchange Bank, of Ogallala, Nebraska; The First State Bank of Brule, Nebraska; The Gordon State Bank, of Gordon, Nebraska; The Northwestern State Bank, of Hay Springs, Nebraska; The Bank of Danbury, of Dan-
100 bury, Nebraska; The Morrill State Bank of Morrill, Nebraska; The Banking House of A. Castetter, of Blair, Nebraska; The Farmers State Bank of Plainview, Nebraska; The Security Bank of Creighton, of Creighton, Nebraska; The Farmers' State Bank, of Orchard, Nebraska; The Brunswick Bank, of Brunswick, Nebraska; The Farmers and Traders Bank, of Wakefield, Nebraska; The Elkhorn Valley Bank, of Tilden, Nebraska; The Laurel State Bank, of Laurel, Nebraska; The Belden Bank, of Belden, Nebraska; The Farmers State Bank, of Laurel, Nebraska; The Citi-

zens' State Bank, of Battle Creek, Nebraska; The Citizens State Bank, of Petersburg, Nebraska; The Inman State Bank, of Inman, Nebraska; The Emmet State Bank, of Emmet, Nebraska; The Elgin State Bank, of Elgin, Nebraska; The Atlas Bank, of Neligh, Nebraska; The Oakdale Bank, of Oakdale, Nebraska; The State Bank of Clearwater, of Clearwater, Nebraska; The Royal State Bank, of Royal, Nebraska; The Citizens Bank, of Stuart, Nebraska; The Bank of Thayer, of Thayer, Nebraska; The Bank of Lushton, of Lushton, Nebraska; The Bank of Crab Orchard, of Crab Orchard, Nebraska; The Bank of Dixon County, of Ponca, Nebraska; The Republican City Bank of Republican City, Nebraska; The American Bank of Sidney, Nebraska, and The Farmers State Bank of Big Springs, Nebraska, Plaintiffs,
101 and John L. Webster and William V. Allen, their Solicitors:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, at Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the Circuit Court of the United States for the District of Nebraska, Lincoln Division, wherein the above named The First State Bank of Holstein, Nebraska, and others are appellees and Ashton C. Shellenberger, Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, Lawson G. Brian, State Treasurer of the State of Nebraska, William T. Thompson, Attorney General of the State of Nebraska, Edward Royse, Secretary State Banking Board and Sam Patterson, are appellants, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 17th day of January, A. D. 1910, and of the Independence of the United States the one hundred thirty-third.

THOMAS C. MUNGER,
United States District Judge, One of the Judges Presiding in the Circuit Court.

Attest:

[Seal United States Circuit Court, District of Nebraska, Lincoln Division.]

GEO. H. THUMMEL, *Clerk.*
J. H. McCLAY, *Deputy,*
For Clerk.

102 Service of the within citation and receipt of a copy thereof admitted this 17th day of January, 1910.

JOHN LEE WEBSTER &
WILLIAM V. ALLEN,
Solicitors for the said State Bank of Holstein, Nebraska, et al., Appellees and Plaintiffs in Lower Court.

Filed Jan. 22, 1910. Geo. H. Thummel, Clerk. By J. H. McClay, Deputy.

[Endorsed:] In the Circuit Court of the United States, District of Nebraska, Lincoln Division. First State Bank of Holstein, Nebraska, et al., Plaintiffs, v. Ashton C. Shallenberger, Governor of the State of Nebraska, et al., Defendants. Citation.

103 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Geo. H. Thummel, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that pursuant to the order of court and in compliance with the præcipe found on page 3 hereof, the foregoing record has been made; and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court as mentioned in said præcipe, and as indicated in the foregoing index, in the case of The First State Bank of Holstein, Nebraska, et al., against Ashton C. Shallenberger, Governor of the State of Nebraska, et al., No. 5, Docket B, and that a copy of the citation, duly certified, has been lodged and remains in my said office as such clerk.

Witness my hand and the seal of said court at Lincoln in said district, this twentieth day of January, A. D. 1910.

[Seal United States Circuit Court, District of Nebraska, Lincoln Division.]

GEO. H. THUMMEL, *Clerk*,
By J. H. McCLAY, *Deputy*.

Endorsed on cover: File No. 22,025. Nebraska C. C. U. S. Term No. 445. Ashton C. Shallenberger, governor of the State of Nebraska; Silas R. Barton, auditor of public accounts of the State of Nebraska, et al., appellants, vs. The First State Bank of Holstein, Nebraska, et al. Filed February 17th, 1910. File No. 22,025.

Office Supreme Court, U. S.
FILED.
OCT 11 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 445.

ASHTON C. SHALLENBERGER ET AL.,
APPELLANTS,

vs.

FIRST NATIONAL BANK OF HOLSTEIN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

MOTION TO ADVANCE.

Now come the appellants in the above-entitled cause and move the court to advance this cause and set the same down for argument at the time the case of Noble State Bank *vs.* Haskell *et al.*, No. 71, shall come on for hearing.

Said case of Noble State Bank *vs.* Haskell *et al.*, No. 71, October Term, 1910, is commonly known as the

"Oklahoma Bank Guarantee Case" and involves the constitutionality of an act commonly known as the Oklahoma Bank Guarantee Law. Ashton C. Shallenberger *et al. vs.* First National Bank of Holstein *et al.*, involves the constitutionality of a statute of Nebraska commonly known as the "Nebraska Bank Guarantee Act." As both cases involve the constitutionality of "Bank Guarantee Laws," the appellants herein deem it expedient that both cases should be argued at one and the same time, and to that end suggest this case be advanced to be heard with the Oklahoma case.

W. T. THOMPSON,
Attorney and Counselor for Appellants.

The appellees consent to the granting of this motion to advance.

JNO. L. WEBSTER,
Solicitor for Appellees.

What is meant by their "chartered" rights will be seen from section 4 of the law under which they were operating when the guaranty law was enacted. It made it unlawful "for any corporation, partnership, firm, or individual to transact a banking business without first having obtained from the State Banking Board a charter," etc. Their claim of having a "natural" and "inherent" right to exercise a charter right is suggestive of the fallacy running through their entire argument. A natural or inherent right is the gift of God; a charter right is the gift of the State, and in Nebraska is subject to the following constitutional safeguards:

> "No bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

Section 16, article 1, Const.:

> "No corporation shall be created by special law, * * *. All general laws passed pursuant to this section may be altered from time to time or repealed," section 1, article 11, Ib.

Again, is it not a little remarkable for the corporate bodies defendants—mere creatures of the law—to lay claim to a natural right? If it be said that this claim is put forward only by the natural persons defendants, then we ask how does it happen that a "natural" and "inherent" right is dependable on the "cash value" of the property owned, which the former law arbitrarily fixed at a specified sum. See section 4 of the former law, page 16, Appellees' Brief.

It is freely conceded on both sides that at common law banking in all its branches was free to all. But we distinguish between common law rights and "natural" and "inherent" rights. It is a part of the common law that the rights enjoyed by individuals thereunder are all held subject to the right of the sovereign to promote the common good. It has never been supposed that the adoption of the State or Federal Constitution or of any of the amendments thereto rendered

all common law rights immutable and indistructible. In fact, this court on more than one occasion held exactly to the contrary.

Mr. Justice Harlan, dealing with the fourteenth amendment, in *Muggler* vs. *Kansas*, 123 U. S., 623-664, said:

> "It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health or morals of the community."

In *Barbier* vs. *Connolly*, 113 U. S., 27, this Court said:

> "But neither the amendment (fourteenth), broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

BANKING IS NOT MERELY A MATTER OF PRIVATE CONCERN

From the earliest history of banking in modern Europe it has been a matter of grave public concern, and fostered and encouraged as a *quasi* public institution, and discharging important governmental functions. That it has been so regarded in this country is attested by both our legislative and judicial records.

The relations of a banking system to a government were never more clearly set forth than by Alexander Hamilton in his advocacy of his plan for the establishment of the Bank of the United States. The three principal advantages of such a system were thus enumerated by him:

1. The aug- ~~argu~~mentation of the active or productive capital of the country.

2. Greater facility thereby afforded the government in obtaining pecuniary aids, especially in sudden emergencies.
3. Affording facilities for the payment of taxes.

> Lodge's Works of Alexander Hamilton, vol. 3, p. 125, et seq.

He went further and maintained that a banking system was one of the means requisite and fairly applicable to the attainment of the ends of the powers delegated to the Federal Government, and, therefore, the power to create such system had been delegated by implication. Congress adopted his plan and this court adopted his argument in *McCulloch* vs. *Maryland*, 4 Wheat., 424.

It was there held, in substance, that a bank or banking system is an appropriate governmental agency, and that the power to create an instrumentality for the employment of such agency was among the implied powers of the Federal Government. It is worthy of note that *throughout all the controversy leading up to the establishment of that system, as well as in the argument of the case just referred to, it was assumed that a sovereign State had authority to create such agency; the authority of the Federal Government was challenged, only on the ground that the power to do so was not among those delegated to it.* But this Court, dealing exclusively with the delegated powers of the Federal Government, said:

> "The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union, it may be exercised by that Government."

If the Federal Government, operating under delegated powers, may lawfully create such agencies, then for stronger reasons a State, in the exercise of its general powers, may create

them, and all the reasons for holding that a banking institution or system is a useful and appropriate agency for the attainment of the ends of the Federal Government, apply with equal force to the proposition, that an institution or system of banking is a useful and appropriate means to serve the ends of the State government.

An examination of the legislative acts of many of the States will disclose that from a very early period they proceed on the assumption that banking was a matter of public concern, as is well illustrated by the language of the Court in *Williams* vs. *Union Bank*, 2 Hump., 339 (340):

> "A bank is created upon public considerations to subserve public ends and not for private purposes only. Its notes are intended to constitute the currency of the country, thereby becoming a medium of exchange for the public benefit. The profits that the stockholders may receive are incidental, but are not the primary object in passing the charter. Although, therefore, the corporation may be correctly denominated a private corporation, yet the law creating it is a public law."

It may be urged that the Federal Government reserved the right to take stock in the bank it created, and that many of the States made a like reservation in their grants. But it was not that reservation that gave such banks their character as a governmental agency. That is a mere accident, not going to the substance. They were created because they would serve the ends enumerated by Alexander Hamilton. The governments creating them had the power to make their relations with their creatures intimate or remote as they saw fit; to govern them through a board of directors or by general laws regulating them. But in any case they would be governmental agencies performing important public functions.

THE POWER TO CREATE SUCH AGENCY CARRIES WITH IT THE POWER TO MAKE IT EXCLUSIVE IN THE DOMAIN WITHIN WHICH IT OPERATES, WHETHER SUCH AGENCY BE OPERATED DIRECTLY BY THE STATE OR THROUGH INSTRUMENTALITIES CREATED BY IT.

Assuming, then, that a State has the power to create and operate, either directly or through the agency of a corporate body, a banking system, has it the right to make such system exclusive? That a government may monopolize a field which it has deemed proper to enter for the accomplishment of its ends would seem to follow as a necessary conclusion from the argument of Chief Justice Marshall in the bank case. There, one of the questions which arose was, whether a branch of the Bank of the United States, located in the State of Maryland, was subject to taxation by that State. In the discussion of that question the Chief Justice said:

> "This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be termed an axiom, other propositions are deduced as corollaries on the truth or error of which and on their application to this case the cause has been supposed to depend. These are: 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with the powers to create and to preserve. 3d. That where this repugnacy exists that authority which is supreme must control, not yield to that over which it is supreme. * * *
>
> "It is of the very essence of supremacy to remove all obstacles to its action with its own sphere, and so modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms, it is so involved in the declaration of supremacy, so necessarily implied in it that the expression of it could not make it more certain."

Subject to the Constitution and laws of the United States, the constitution of a State is the supreme law of that State, and within those limitations the authority of the State is supreme. If the supremacy of the Federal Constitution will intervene to prevent any action on the part of a State tending to obstruct or destroy, or to impair the effectiveness of an agency created by the Federal Government for governmental purposes, may not the supremacy of the State be invoked and employed to prohibit such acts on the part of individuals as tend to destroy or obstruct, or to impair the effectiveness of its agencies?

In *State ex rel.* vs. *Ashley*, 1 Ark., 513, where the defendant was charged with usurping a banking franchise, the Court (p. 536) said:

> "It is equally clear that the charter is a public law, not a private act, for the privilege of banking cannot be exercised without authority of law, and in its very nature and essence it appertains and essentially belongs to the act of sovereignty."

At an early date, 1827, Tennessee enacted a law prohibiting private banking. In 1859-60 another act was passed making it lawful for certain persons, partnerships, and associations to receive deposits, issue checks or bills of exchange, or discount notes, bills, or other securities.

In *State ex rel.* vs. *Lookout Bank*, 89 Tenn., 278, which was a *qui tam* action to recover a penalty imposed by the earlier act, the question arose as to what persons were included in the later act, removing some of the restrictions of the former, and the Court said:

> "By the act such persons, partnerships, and associations 'shall be hereafter allowed to receive deposits, issue checks or bills of exchange, or discount notes, bills, or other securities.' This was certainly intended to confer these privileges on some one that did not have them. Incorporated banks had the privileges already, and always had the privileges conferred by the act. It was manifestly intended to confer these privileges upon the licensed money-dealers and not upon incorporated banks."

In *Nance* vs. *Hemphill*, 1 Ala., 551, one of the questions which arose was whether certain transactions involved illegal banking, and the Court (p. 558) used this language:

> "There cannot, therefore, be any doubt that private banking is a common law right.
>
> "It is, however, said in argument, that if private banking is not expressly prohibited by the constitution of this State, yet as the State has reserved to itself the privilege of banking, either alone or in connection with individual citizens, it is, therefore, against the policy of the State to permit the exercise of this right in any other mode.
>
> *"It may be true that as the State has engaged in the business of banking it is good policy to exclude from competition private bankers, but this the legislature can alone declare. A great many considerations must enter into the solution of that question, which the legislative department is alone competent to determine.*
>
> "This will be evident when we consider that what would be for the interest of the State in such a case, or in other words what course sound policy would dictate, must always be a question of expediency, depending on the extent to which the State might think it proper to engage in the business of banking, and a variety of other facts varying at different times and fluctuating and uncertain in their character. It is too obvious, therefore, to require further illustration or argument that the judicial tribunals, whose province it is to pronounce on fixed and settled rules of action, have no power to determine such questions."

In *Hazen et al.* vs. *Union Bank of Tennessee*, 1 Sneed's Rep., 151, the question arose whether the defendant had been illegally engaged in banking, and in disposing of that question the Court said:

> "We may observe that the business of banking was a common law right, which any person at his discretion, might lawfully exercise, until it was restrained by the act

of 1827, upon consideration of public policy and convenience. Ohio Ins. Co. *vs.* Merchants Ins. Co., 11 Humph. R., 23.

"That law operates as a general prohibition against the exercise of this right, except where it may be granted as a franchise to natural persons or incorporated companies. But it has never been considered that the laws containing these exclusive privileges of banking, are repugnant to the Constitution as not being 'laws of the land,' of general application."

Mr. Hopkinson, in the course of his argument in *McCulloch* vs. *Maryland*, 4 Wheat., 424, said: "A State will not suffer its own citizens to erect a bank without authority," and his statement passed unchallenged.

See also:

State vs. *Stebbins*, 1 Stewart, Ala., 312.

In former briefs we have cited:

Meyer vs. *Irwin*, 2 Searg. & R., 367;
Weed vs. *Berge*, 124 N. W. (Wis.), 664;
State ex rel. vs. *Woodmouse*, 1 N. Dak., 245;
People vs. *Utica Ins. Co.*, 15 John., 358.

Other States, among them Maine and New Jersey, have long had acts prohibiting unincorporated associations from engaging in banking, and the restraining act of New York contained a similar provision. We have not found that the constitutionality of such prohibition was ever questioned. Now, if a State may prohibit unincorporated associations from banking, she may prohibit individuals, for whatever it was lawful at common law for a single individual to do he might do associated with another.

Nance vs. *Hemphill*, 1 Ala., 551 (556).

The foregoing citations—historical, legislative, and judicial—show that in this country banking has ever been regarded as a

business of a public nature, which should not be left to the mere will and pleasure of individuals, but reserved for public control and administration. In other words, show that the right of banking is or should be the support of a grant.

> "A franchise is a right, privilege, or public concern which ought not be exercised by private individuals at their mere will or pleasure, but should be reserved for the public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."
>
> *Cent. Pac. R. Co.* vs. *People*, 162 U. S., 91;
> *Cal.* vs. *Cent. Pac. R. Co.*, 127 U. S., 1.

The right of banking in this country from the earliest times has been almost universally regarded as a right or privilege following within the foregoing definition.

If banking be regarded as a proper subject of a franchise from the State, or if it be competent for the State to create a banking system as a public agency, to be administered through instrumentalities created by her, then it would follow that she may attach such conditions to the grant as she may see fit, or create such instrumentalities in her own way.

THE LAW IS NOT UNREASONABLE, NOR PALPABLY IN EXCESS OF LEGISLATIVE POWER

The mere fact that a court might differ with a legislature in its views of public policy, or that judges may hold various views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference unless such law is unreasonable and palpably in excess of legislative power.

> *McLean* vs. *Arkansas*, 211 U. S., 547;
> *Baker* vs. *Walker*, 204 U. S., 311.

NOT AN INNOVATION

Notes issued by a bank are liabilities of the bank just as are deposits received by it and no more sacred. Laws requiring banks to pay assessments for the redemption of the notes of insolvent banks were enacted by New York and other States where State bank notes circulated as money. A similar law prevails in Canada today. Hon. Lyman Gage, before the Committee on Banking in the House of Representatives, said:

> "I am persuaded that it is just as equitable, wise, and right that the creditors of the banks which come under the provisions of the bill, will have their deposits guaranteed to them, as well as the bank's circulation, both held by the general public. The nature of the application is exactly the same in principle, whether evidenced by a pass book or the bank's notes in the form of money; there is no difference in principle."

Counsel rely with some confidence upon *Marymont* vs. *Nevada*, etc., 111 Pacific, 295. But a reference to the opinion of the Chief Justice in that case will disclose that decision of the question whether banking could be restricted to corporations was not necessary to a determination of the case.

RELATION OF THE DEPOSITOR TO THE BANK

Counsel for the banks contend that the relation of the depositor to the bank is one simply of debtor and creditor. This contention has no support either in law or on the facts. The relation of a depositor to the bank is not the ordinary one of debtor and creditor; a debtor may refuse to pay his creditor; the creditor can only sue for the debt. The depositor can sue the banker, not only for the debt, but also for damages for refusing to pay the check.

Mt. Sterling Bank vs. *Green*, 99 Ky., 262.

The relation of the depositor to the bank was not one of contract at common law, because the form of action is an action on the case.

First National Bank vs. *Shoemaker*, 177 Pa., 94, 102.

The banker is liable in tort for refusing to pay the depositor's checks so long as he has sufficient funds rightfully to the credit of the depositor. In discussing the relations of the depositor to the banker Mr. Zane, in his work on banking, p. 201, says:

> "It is the nature of this right that is in question. Some courts have said it is a contract right arising out of the agreement made by the bank with its depositors. It is certainly not an express contract, because no such contract is ever made. It is not a contract implied as a fact, because the measure of damages is that of tort and not of contract and because wilfulness and maliciousness are a part of the act—not actual malice necessary, but the malice that is implied from the doing of a wrongful act. Therefore, the dishonor of a check is a tort. The closest analogous relations are the duties owed by common carriers or innkeepers. In those cases the law raises the duty on motives of public policy out of the relation. So in the case of a banker and his depositor the law raises the duty out of the relation. Historically, the deposit in the bank is a bailment, belonging to the same general class as the carrier's and innkeeper's bailment. The relation of bailor and bailee imposes certain duties, a breach of which is redressed by a common law action. Although the bailment has been in process of time changed to a debt, certain characteristic features of it have remained. There is a contract only in the sense of a quasi contract. The contract is wholly *ex lege;* it is not the result of any agreement between the parties."

The facts are that the banking business is made profitable by the depositor; on him rests the welfare, the prosperity and the well being of banking. In a large measure the welfare, security, and prosperity of business depends on the faith that the depositor has in the banking institutions of the State. If the depositors become alarmed and withdraw their money from the banks business is crippled; the public are injured; society in general is injuriously affected. Fear on the part of depositors is the primary cause of many of the panics that have

occurred in this country. It was fear on the part of the depositor and the banker that caused the memorable panic of 1907.

Lack of confidence on the part of depositors brings disaster and business ruin, not only to the banking business, but to all lines of business.

For the purpose of giving a sense of security to depositors, those engaged in banking have been limited and restrained. Limits have been placed on the amount of loans that banks can make to certain classes of people. Restrictions have been placed on the right of officers of the banks to borrow money from their bank. Provision has been made in most States providing for the amount of capital that persons must have before they can engage in the banking business. A system of public inspection of the books, records, and affairs of banks has been provided for. In most States banking must be conducted under a charter issued by the State. In practically all the States all kinds of banking, including so-called private banks, are under public supervision and control.

Counsel erroneously assume that banking is conducted primarily and exclusively for the benefit of the banker; that the franchise issued by the State to those engaged in the banking business is for the exclusive use and benefit of the banker. Incidentally the banker is benefited, but in passing regulations governing the business the State has two objects in view:

First, to safeguard and protect the rights of the bankers; and

Second, to safeguard and protect the rights of the depositors.

Any system of regulation that overlooks the rights of either of these parties is incomplete. A system of regulation that does not contain adequate provisions to protect the depositors from loss is defective. It overlooks the rights of those upon whom the business primarily depends for its welfare.

ASSESSMENTS PROVIDED FOR ARE MADE BY VIRTUE OF THE POLICE POWER OF THE STATE

It is earnestly contended that the taking of the property of the bank by the assessments provided for in the law is a confis-

cation of property; that it takes from the prosperous to compensate those who are not prosperous; that it takes one man's property to pay the debts of another; that it is an improper use of the taxing power of the State.

The learned circuit judge who decided this case took the view that the levy and collection of these assessments was an exercise of the taxing power of the State. The fallacy of this position is: That no distinction is to be drawn between those demands of money made by the Government for the purposes of revenue and those demands of money made by the Government for the purposes of regulation.

The demands made by the Government for the purposes of revenue are an exercise of the taxing power. The demands made by the Government for the purposes of regulation are an exercise of the police power.

The assessments provided for are not for the purposes of raising revenue. They are an incident in the plan of regulating the banking business. These assessments are of the same nature as those that have been heretofore made for the payment of the fees of bank examiners under a system of bank examinations which requires the banks to defray the expenses of examination.

Every argument made against the payment of the assessments provided for in this law can, with equal force, be made against the payment of fees of bank examiners. Reducing this argument to its last analysis, a solvent bank does not have to be examined, and therefore should not be required to pay the examination fee. Only those banks that are insolvent or in failing condition need an examination; therefore, those whose need the examination should pay the expense of making it. It is admitted that the depositor in an insolvent bank will be the direct beneficiary of the assessments provided for. He will be protected against loss in the event of the failure of the bank. Like the bank examiner the depositor will be the direct beneficiary of the amounts contributed by those engaged in the banking business, but the provision for the payment of the depositors has a wider application than the mere compensation of depositors in defunct banks. It has to do with the

general security and permanence of the banking business. This regulation has the interest of the public in mind rather than the incidental benefits that may accrue, by reason of its provisions to certain classes of people.

Among the advantages that will accrue to the public and to the banking business by reason of the levy and collection of these assessments are the following:

1. It will prevent losses and hardships to depositors.
2. Sound banking will be promoted.
3. The number and seriousness of bank failures will be reduced.
4. The failure of sound banks will be eliminated.
5. The assets of failed banks will be protected against sacrifice.
6. The state and national governments can patronize banks without requiring bonds to be given by these institutions for the security of the public money.
7. Public confidence in banks will be insured and thereby prevent panics.
8. It will cause the deposit of large sums of money in the banks of the country that now remain in hiding, because of lack of confidence in our banking system.

It is urged that depositors should not be distinguished or put in a class by themselves; that to do this is an arbitrary and unreasonable use of the police power. The right to levy a circulation tax to guarantee the circulating medium issued by banks of issue has been sustained. The banks issuing money whether sound or unsound, contributed a fixed percentage on all notes issued by them. This fund was placed in the hands of a person designated by the law. If any of the banks of issue failed and the assets were not sufficient to pay all the liabilities of the bank, the person holding the note was compensated out of the circulation tax fund. Every argument made against the assessment plan of the law under consideration can, with equal force, be made against a circulation tax. The sound

bank contributed to a joint fund the same as the unsound bank. This fund is used to pay the debts of others engaged in the same line of business. It is the taking of one man's property to pay the debts of another. The right to provide for a circulation tax is unchallenged. Indeed, it has the approval not only of the courts, but of a large part of those engaged in the banking business.

THE DEPOSITOR'S SIDE OF BANKING

When the briefs are examined we readily perceive that counsel for the banks have viewed this law entirely from the present pecuniary interest of the banker. Counsel have proceeded on the theory that the depositor should look out for himself; that he should discriminate between those agencies created by the State for the purpose of conducting the banking business; that the assessments provided for should not be made, simply because the banking business must pay the expense. Counsel overlook the fact that the State in effect says, when it allows a bank to remain open, that it is a solvent bank; that because of this people place their money on deposit. Experience has shown that many banks that have been permitted to remain open by the State are insolvent and that innocent people have suffered irreparable loss by reason of these insolvent banks. They overlook the fact that the regulations provided for in this act are incidental matters which seek to absolutely prevent loss to the depositors.

The history of banking shows that the rights of both the banker and the depositor must be considered in making regulations of the business. The view point of the banker and the view point of the depositor are different, but the State in making regulations should provide for the safety of both.

The early theory of banking in continental Europe looked at the side of the depositor more than it did at the side of the banker. Provisions were made by practically all of the early banks to give the depositor security. We call the Court's attention to the Bank of Venice, to the Bank of Barcelona, to the early banks of Holland. In Venice the deposits in banks, as far back as 1156, were guaranteed by the State. The city

guaranteed the deposits of the Bank of Barcelona. The city guaranteed the deposits of the Bank of Amsterdam. In speaking of this guarantee, the historian says:

> "The guarantee of the city seldom gave rise to any claim against it. Here and there, however, we find an example of this, as in 1686, when the city had to replace 43,770 guilders stolen from the bank."

Venice, Barcelona, and Amsterdam were the trading centers of the middle ages. The plan of guaranteeing deposits was made for the purpose of inducing people to place their money on deposit, so that the capital of society might be augmented; so that the public might use these funds in trade and commerce. While the guaranteeing of deposits was a direct benefit to the depositor, the ultimate effect of the guarantee was the welfare of the State in general.

In England the early history of banking shows that deposits were made for the benefit and protection of the depositor. The depositor paid for the privilege of having some person take care of the deposit. Originally the goldsmiths of Lombard street were engaged in this line of business. Later, it was found that these deposits could be used to advantage in trade and business. Out of this was evolved the English banking system, but because of the original conception of a bank deposit the idea remained that the deposit was made primarily for the benefit of the depositor; that it was a bailment for hire.

Hence, we have the two conceptions of bank deposits. That of England, where the deposit was made primarily for the benefit of the depositor, and the continental idea, where the deposit was made primarily for the benefit of the public Having inherited our ideas and plans of regulation of the banking business from Great Britain, we have in a measure overlooked the importance and the rights of the depositor. One of the defects of our banking system is that we have overlooked the safeguards that are necessary to protect those who are the foundation of the banking system.

When Alexander Hamilton began to study and formulate

a plan of banking for the United States the English conception of the deposit being made for the benefit of the depositor was in his mind. In an early recommendation of a plan of banking made to General Washington, he recommended that depositors should pay for the privilege of making deposits in the bank. Ten years later, when he made his recommendations for a plan of banking to Congress, he changed this. It was apparent to him that a successful banking system for this country should make provision to induce those having small amounts of money to place them on deposit in the banks of the country so that society might have the use of these funds to facilitate trade and commerce.

RIGHT TO AN INJUNCTION NOT CLEAR

It has been assumed that the right to secure an injunction against the banking board of the State of Nebraska in a circuit court of the United States has been settled. The learned circuit judge evidently thought he had jurisdiction when he made the final order in the case at bar. We assume that this is based on the rule laid down by this court in

Ex parte Young, 209 U. S., 123.

We contend that the facts pleaded in this cause do not bring this case within the rule announced in the Young case. The State of Nebraska has provided complete and adequate remedies both in law and equity for the complainants. By pursuing those remedies the complainants should not be deprived of their liberty or their property without due process of law.

In the Young case this Court took the view that the provisions of the regulations passed by the State of Minnesota were so arbitrary and so arranged that no adequate remedies were left open to those who were affected by the regulations. The penalties imposed were so drastic and so far-reaching that it would have been impossible to conduct the business of common carriers until these questions could have been passed on by the State courts. As we view it the complainants in this action, in order to invoke the jurisdiction of the courts of the United States, must bring themselves squarely within the

conditions that appeared in the Young case. This they have not done.

The facts in the instant case bring it squarely within the rule announced in

Fitts vs. *Magee*, 172 U. S., 516.

See—

Allen vs *Baltimore*, 114 U. S., 311.
Poindexter vs. *Greenhow*, 114 U. S., 270, 282.
U. S. vs. *Lee*, 106 U. S., 196.

Notwithstanding the rule announced in the Young case we respectfully contend that the granting of the injunction against the appellant was a violation of both the letter and spirit of the eleventh amendment. The allowance of this writ by the circuit judge has prevented the State from exercising its political and governmental powers. He has extended the judicial power of the United States to a suit in equity commenced and prosecuted by citizens in effect against the State of Nebraska.

Respectfully submitted.

I. L. ALBERT and

ARTHUR F. MULLEN,
Attorney-General of the State of Nebraska,
For Appellants.

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 445. (22,025.)

ASHTON C. SHALLENBERGER, GOVERNOR, ET AL.,
Appellants,

v.

THE FIRST STATE BANK OF HOLSTEIN, ET AL.,
Appellees.

BRIEF AND ARGUMENT FOR APPELLANTS.

I. L. ALBERT,
Of Counsel for Appellants.

STATE JOURNAL CO., LINCOLN, NEBR.

IN THE

Supreme Court of the United States.

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BRIEF AND ARGUMENT FOR APPELLANTS.

PROPOSITIONS SUBMITTED.

I.

Banking is a proper subject for police regulation.

II.

It may pass from a common-law right, exercisable at pleasure, to a right lawfully exercisable only under a franchise from the state.

III.

A bank, or banking system, is an appropriate governmental agency which the state may create and employ to serve its legitimate ends.

IV.

The power to create such agency carries with it the power to make it exclusive in the domain within which it operates, whether such agency be operated directly by the state, or through instrumentalities created by it.

I.

Banking is a proper subject for police regulation.

It is not my purpose at this time to enter upon an exhaustive examination of the police power. That ground is covered by the briefs hereto filed in this case and in the case with which it was consolidated for argument in this court. It will suffice to say for the present that such power is traceable to the right of self-preservation, and in general may be defined as the power of a state to protect itself, and to employ all means requisite and fairly applicable to the attainment of its ends.

That banking is a proper and legitimate subject for police regulation, has never been seriously denied. As was said in *State v. Woodmansc*, 1 No. Dak. 245, we have been unable to find any authority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of the police power, to regulate, restrain and govern the business of banking. And the decided weight of authority is to the effect that such regulation may go to the extent of restricting banking to incorporated associations.

Weed et al. v. Bergh, 124 N. W. (Wis.) 664.
State v. Woodmansc, supra.
Myers v. Bank, 20 Ohio, 283.
Meyers v. Irwin, 2 Serg. & R. 367.

II.

It may pass from a common-law right, exercisable at pleasure, to a right lawfully exercisable only under a franchise from the state.

It is not a long step from regulation to prohibition, and a still shorter one to such restricted prohibition as

goes with permitting the enjoyment of a right only to those holding a franchise. When the plan of Robert Morris for the incorporation of the Bank of North America was adopted by congress, it was with the recommendation to the several states that they pass laws to the effect that no other bank should be established or permitted therein during the war then in progress. That was a legislative recognition, not only of the right of a state to control banking, but of the possibility of the transformation of the common law right of every citizen to engage in that business, into a right which could be lawfully exercised only under a grant from the state. It is the more significant from the fact that the recommendation was made at a time when the people generally were better informed as to the extent and nature of their common law rights, and more jealous of the encroachment thereon than they had ever been before, and have ever been since.

Mr. Hopkinson, in the course of his argument in *McCulloch v. Maryland*, 4 Wheat. 424, laid down this proposition, and it passed unchallenged:

"A state will not suffer its own citizens to erect a bank without its authority."

An act of the legislature of New York, commonly called the restraining act (Sess. 27, c. 114), provided that no person, unauthorized by law, should subscribe to or become a member of any association, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks might do, or might transact by virtue of their respective acts of incorporation. A consideration of that act was involved in *People v. Utica Ins. Co.*, 15 Johnson, 353. In the opinion of Spencer, J., are these words:

"The right of banking since the restraining act is a privilege or immunity, subsisting in the hands of citizens by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege, and consequently, it is the usurpation of a franchise, unless it can be shown that the privilege has been granted by the legislature. * * *."

"Had the defendants claimed and exercised the right of banking as private individuals, I agree that an information would not lie against them; they would have been subject only to the penalties inflicted by the act. * * *."

The court was unanimous (the judges participating in the decision) on the proposition that, since the restraining act, banking had been a franchise.

The recommendation of the Continental Congress to the several states with respect to the Bank of North America; the proposition advanced by Mr. Hopkinson in *McCulloch*, above quoted, which was advanced in open court and passed unchallenged; the decision of the supreme court of New York in *People v. Utica Ins. Co., supra;* all dating back to times when the rights of citizens were more generally discussed and perhaps better understood in general than they have ever been since, are highly significant as tending to show the then common understanding that a common-law right might be transformed into a right which could be lawfully exercised only under a grant from the state.

It will be conceded as a self-evident proposition, we think, that if the right to engage in any branch of a business may pass from a common-law right, exercisable at the pleasure of the individual citizens, to one lawfully exercisable only under a franchise, it is not inherently impossible that one or more of the other branches of the business may undergo a like transformation.

The common-law right of banking extended to banking in all its branches. In *Bank of Augusta v. Earle*, 13 Pet. 519 (595-6), this court said:

"At common law the right (banking) in all its ramifications belonged to individual citizens, and might be exercised by them at pleasure."

Substantially the same language was used in *State v. Scougal*, 3 S. Dak. 55. The phrase "in all its ramifications" is most comprehensive. In *Mercantile National Bank v. New York City*, 121 U. S. 138 (156), this court said:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue, in receiving deposits payable on demand; * * *."

In *Exchange Bank v. Hines*, 3 Ohio St. 1 (31), the court enumerating some of the branches of banking said:

"The business of banking, in its most enlarged signification, includes the business of receiving deposits, loaning money, and dealing in coin, bills of exchange, etc., besides that of issuing paper money."

Mr. Webster, in the course of his argument in *Bank of Augusta v. Earle, supra*, asked:

"What is that, then, without which any institution is not a bank, and with it is a bank?"

He answered his own question in these words:

"It is the power to issue promissory notes with a view to their circulation as money."

Enough has been said to show that, whatever may be the modern conception of a bank, the power to issue notes with a view to their circulation as money was formerly incidental to the right to engage in banking.

But that the right to issue notes with a view to their circulation as money has long been regarded as a franchise, and not one exercisable at the pleasure of each citizen, is a historical fact. The Honorable Leonard H. Cortney, member of the British Parliament and author of the article on Banking in the Encyclopedia Britannica, there said:

"It was, for example, formerly generally allowed to be a part of the business of a banker to borrow money by issuing promissory notes payable to bearer, which passed from hand to hand as money, within the sphere of the operations of the banks, and banks thus borrowing money were called banks of issue; but it has been contended of late years that the function of issuing notes passing by delivery as money should be reserved for the state, or for some institution controlled and directed by the state." (New Am. Supp., p. 315.)

"The reasons of convenience which justify a prohibition of the liberty of issue are, first, that experience has shown that this process of borrowing is too potent and too easily abused to the precipitation and aggravation of commercial crises; and, secondly, that the great and almost insuperable difficulty of refusing to receive notes which have obtained general currency makes it most desirable that such notes should possess some better guarantee than can be always forthcoming of the solvency of private issuers." (P. 327, Id.)

Zane, in his work on Banks and Banking (7 to 15 inclusive), says:

"All the courts seem to have recognized that the power to issue notes to circulate as money could be made a franchise. No one seems to have ever questioned the right of the legislature to make the power to issue currency a franchise grantable by the state. It is put on the ground that the government has the power to protect its subjects from a worthless currency."

Then follows the conclusion we have been aproaching in this branch of the argument; it is as follows:

"If the legislature can take away one branch of banking from private citizens for the public good, it would seem to follow as a matter of strict logical deduction that all branches of the business could be made franchises."

When we take into account the intimate relations of the other branches of banking to the commercial and industrial life of the people; that bank paper has largely taken the place of money in the business world; the disasters consequent upon dishonest and improvident banking, it becomes quite clear that the dangers to be apprehended from the issuance of notes to circulate as money by banks differs but slightly in degree, and not in kind from those to be apprehended from unrestricted banking in other branches, and, that taking into account the change of conditions, the reasons of convenience stated, by the honorable author above quoted, justifying a prohibition of the liberty of issue, would justify a prohibition of the liberty to engage in other branches of banking, and would justify the state in restricting the privilege to such as operate under a franchise.

III.

A bank, or banking system, is an appropriate governmental agency which the state may create and employ to serve its legitimate ends.

The argument of Alexander Hamilton for the incorporation of the Bank of the United States, to most minds at least, has never been answered. It proceeded from the proposition that every power vested in a government is, in its nature, sovereign, and includes, by force of the term, the right to employ all means requisite, and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and excep-

tions specified in the constitution; or not immoral, or contrary to the essential ends of political society. In the main it was adopted by this court in *McCulloch v. Maryland,* 4 Wheat. 424.

That argument is based in part upon the proposition that a bank, or banking system, is an appropriate governmental agency, and that the power to create an instrumentality for the employment of such agency is among the implied powers of the Federal Government. Throughout the argument in that case it was assumed that a sovereign state had authority to create an agency of that character; the authority of the Federal Government to do so was questioned, only on the ground that its powers were delegated, and that the power to create a banking institution was not among the powers delegated to it. There this court, dealing exclusively with the delegated powers of the Federal Government, applied the following propositions:

"If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

"The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government."

The conclusion of the court on that branch of the case was stated by Chief Justice Marshall in these words:

"After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."

If the Federal Government, operating under delegated powers, may lawfully create such agencies, then for stronger reasons, a state, in the exercise of its general powers, may create them, and all the reasons for holding that a banking institution or system is a useful and appropriate agency for the attainment of the ends of the Federal Government, apply with equal force to the proposition, that an institution or system of banking is a useful and appropriate means to serve the ends of the state government. As was held in the historic case just cited, the creation of a corporation for banking purposes is merely incidental—a mere choice of means. The government, whether Federal or State, has the power to create a banking system to serve the ends of the government. It may operate such system directly, or by means of an artificial person created by it, but whether the one or the other, the system would still be a governmental agency, with such functions as its creator might see fit to bestow upon it, and subject to such conditions and limitations as it might see fit to impose.

IV.

The power to create such agency carries with it the power to make it exclusive in the domain within which it operates, whether such agency be operated directly by the state, or through instrumentalities created by it.

Assuming, then, that a state has the power to create and operate, either directly or through the agency of a corporate body, a banking system, has it the right to make such system exclusive? That a government may monopolize a field which it has deemed proper to enter for the accomplishment of its ends would seem to follow as a

necessary conclusion from the argument of Chief Justice Marshall in the Bank case. There, one of the questions which arose was, whether a branch of the Bank of the United States, located in the State of Maryland, was subject to taxation by that state. In the discussion of that question the Chief Justice said:

"This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are: 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with the powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. * * *

"It is of the very essence of supremacy to remove all obstacles to its action with its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms, it is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain."

Subject to the constitution and laws of the United States, the constitution of a state is the supreme law of that state, and within those limitations, the authority of the state is supreme. If the supremacy of the Federal Constitution will intervene to prevent any action on the part of a state tending to obstruct or destroy, or to impair the effectiveness of an agency created by the Federal Government for governmental purposes, may not the supremacy of the state be invoked and employed to prohibit such acts on the part of individuals as tend to destroy or

obstruct, or to impair the effectiveness of its agencies? That it may, would seem too clear to admit of argument, and it seems equally clear that to permit individuals to engage in competition with such agencies would tend in those directions. Competition implies a contest wherein the prize is supremacy. Private banking in competition with a system of banks operating as governmental agencies, would necessarily obstruct and impede the operations of the latter, and render them less effective. So that if the reasoning of Chief Justice Marshall was sound —and who doubts it—it is competent for a state to create such agencies and operate them directly or by means of artificial bodies created by it, and make them exclusive within the field of their operations.

In *Louisiana Gas-Light Co. v. New Orleans, etc., Co.*, 115 U. S. 650, one of the questions involved was, whether a state could grant an exclusive franchise for supplying gas to the people of a city, and this court in disposing of that question said:

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits, * * * it is difficult to perceive upon what ground we can deny her authority, when not forbidden by her own organic law, in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies."

Many other cases to the same effect might be cited. Among them are the following:

New Orleans Water-Works Co. v. Rivers, 115 U. S. 674.

Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683.

St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64.

Davenport Gas Co. v. Davenport, 124 Iowa 22.

Atlantic City Water-Works Co. v. Atlantic City, N. J. E. 367.

Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495.

The legislature of Nebraska, by the act under consideration, undertook to create a governmental agency. The first section of the act declares banking to be a *quasi*-public business, and subject to the control of the state. That a banking system is a fitting and appropriate governmental agency, is the holding of this court in *McCulloch v. Maryland, supra*. As a means for the employment of such agency, the state, by the act in question, named corporate bodies, fixing the terms and conditions upon which they might obtain and enjoy a banking franchise. In order to guard against any obstruction or impediment, from competition, in the operations of the agency thus established, and in the exercise of her inherent right to protect herself and her instrumentalities, the state, by the act in question, made that system exclusive, and prohibited banking, unless conducted in accordance with the provisions of that act. In other words, by that act, the state confides to corporations complying therewith the exclusive right to operate a governmental agency, which, on the authority of *McCulloch v. Maryland, supra*, she might operate herself. As was said in *Louisiana Gas-Light Co. v. New Orleans, etc., Co., supra*, "it is difficult to perceive upon what ground we can deny her authority" in the premises, or any escape from the conclusion that a

state may, in the exercise of her sovereign powers, take over the business of banking, and permit it to be carried on only under a franchise granted by her. If it be competent for the legislature to grant an exclusive franchise, as in *Louisiana Gas-Light Co. v. New Orleans, etc., supra,* to a single corporation, "to do for the public what the state might undertake to perform" herself, then upon what ground can it be denied that it may, by general law, provide that such service should be rendered exclusively by such corporations as complied with the terms of the act. That such terms may be onerous, is immaterial, for it is elementary that the sovereign may attach such conditions and impose such restrictions upon a grant as he may see fit.

The act in question is more than a system of regulations for the banking business; its purpose is the creation and regulation of a banking system, a governmental agency. The end is legitimate, on the authority of *McCulloch v. Maryland, supra.* On the same authority, the means employed are appropriate, and plainly adapted to that end. The exclusion from banking of all persons save such as have complied with the provisions of the act, is a proper exercise of the inherent right of a sovereign state to protect itself and its instrumentalities from the hostile influences of competition, to say nothing of the advantages of such a system to the public at large.

Respectfully submitted,

I. L. ALBERT,
Of Counsel for Appellants.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910

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ASHTON C. SHALLENBERGER, GOVERNOR OF THE STATE OF NEBRASKA; SILAS R. BARTON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

v.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES. DISTRICT OF NEBRASKA.

BRIEF OF APPELLANTS.

ARTHUR F. MULLEN,
ATTORNEY GENERAL OF NEBRASKA,
AND
I. L. ALBERT,
For Appellants.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF NEBRASKA.

STATEMENT.

This appeal involves the constitutionality of chapter 10, Laws of Nebraska, 1909, entitled "An Act for the Regulation, Supervision and Control of the Business of Banking, and to provide penalities for its violation, repealing Chapter eight (8) of the Compiled Statutes of Nebraska of 1907, and all acts and parts of acts inconsistent herewith."

The act, as its title implies, presents a comprehensive scheme for the regulation and control of banks. A copy of the act is attached to the bill of complaint as Exhibit "B," and is set out at length in the printed record herein. (Pp. 18-37, Rec.) Among other provisions, it contains the following, which may be said to constitute the grounds upon which its constitutionality is assailed in this suit:

"Section 2. (Unlawful banking. Penalty.) It shall be unlawful for any corporation, partnership, firm or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by means of a corporation duly organized for such purpose under the laws of this state. It shall be unlawful for any corporation to receive money upon deposit or transact a banking business under the laws of this state until said corporation shall have complied with all the provisions and requirements of this act. Any violation of the provisions of this section shall subject the corporation, partnership, firm or individual so offending to a penalty of twenty-five ($25.00) Dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business."

"Section 44. (Guaranty fund. Assessment.) For the purpose of providing a guaranty fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this State, shall be subject to assessment, to be levied, kept, collected and applied as herein after provided.

"Section 45. (Same.) Within thirty days after the taking effect of this act and on the first day of December, 1909, and on the first day of June and December of each year thereafter, every corporation engaged in banking under the provisions of this act, shall make and file with the State Banking Board a statement in writing, verified by the oath of its president, vice president or cashier, showing the average daily deposits in its bank for the preceding six months, exclusive of public money otherwise secured. And on the first day of the month next succeeding the date fixed for the making and filing of such statement, the State Banking Board shall levy assessments against the capital stock of each of said banking corporations as follows: Within sixty days after the taking effect of this act, one-fourth of one per cent of the average daily deposits, as shown by the first statement of such average daily deposits required to be made and filed by the provisions of this section; on the first day of January, 1910, one-fourth of one per cent of the average daily deposits; as shown by the statement required to be made and filed on the first day of December, 1909; on the first

day of July, 1910, and one-fourth of one per cent of the average deposits shown by the statement required to be filed on the first day of June, 1910; and on the first day of January, 1911, one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of December, 1910, and on the first day of July and January of each year thereafter, one-twentieth of one per cent of the average daily deposits, as shown by the statement thereof required to be made and filed next preceeding such assessment. Provided, however, that any bank commencing business and receiving deposits less than six months prior to the date when the statement referred to in this section is required to be made and filed, shall show the average daily deposits for that portion of the said semi-annual period during which it has been engaged in business and receiving deposits.

"Any person making oath to any of the statements herein required, knowing the same to be false, shall be deemed guilty of a felony, and be punished by a fine of not less than one hundred, nor more than one thousand dollars, or be imprisoned in the penitentiary for a term of not less than one, nor more than five years, or both, in the discretion of the court.

"Section 45*a*. (New banks.) Any bank organized subsequent to the date when this act takes effect shall pay into the Depositor's Guaranty Fund four per cent (4%) of the amount of the capital stock, when such bank opens for business, which amount shall constitute a credit fund, subject to adjustment on the basis of said bank's average daily deposits as shown by the first two semi-annual statements required by section 45 of this act. The Banking Board is authorized and empowered to make such an adjustment of the rates of assessments to be paid by any bank which engages in the banking business subsequent to the time when this act takes effect, as shall require such bank to contribute to the Depositor's Guaranty Fund, a just and equitable sum, and the State Banking Board shall adjust assessments of such bank so that the first two assessments, together with the credit fund of four per cent (4%) of its capital stock paid in by said bank when it begins business, shall at least equal one per cent (1%) of the average daily deposits of said bank as shown by the two first semi-annual statements

required by section 45 of this act. Provided, however, that said four per cent (4%) will not be required of new banks formed by the reorganization or consolidation of banks that have previously complied with the terms of this act with reference to the payment of assessments.

"Section 46. (Assessment. Levy. Notice.) As soon as said assessments are respectively levied, the banking corporations against which the same are levied, shall be notified of the amount of such assessment levied against them respectively, by the Secretary of the State Banking Board and said banking corporations shall thereupon set apart, keep and maintain in their said banks the amount thus levied against them and the amounts thus levied, kept and maintained shall be and constitute what shall be designated as a Depositor's Guarantee Fund, payable to the State Banking Board on demand for the uses and purposes hereinafter provided.

"Section 47. (Special assessment.) If the Depositor's Guaranty Fund shall, from any cause, prior to July 1, 1910, be depleted or reduced to an amount less than one-half of one per cent of the average daily deposits, or subsequent to July 1, 1910, be depleted or reduced to an amount less than one per cent of the average daily deposits as shown by the last semi-annual statements thereof filed, the State Banking Board shall levy a special assessment against the capital stock of the corporations governed by the provisions of this act, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits in any one year."

"Section 51. (Claims. Notice.) As soon as a receiver, appointed under this act, has qualified, which shall be within ten days after his appointment, the court in which such proceedings are pending, or a judge thereof shall make an order fixing the time for filing claims against the corporation whose property is under such receivership, which shall not be more than sixty days from the date of such order, and notice thereof shall be given forthwith, by posting a copy of such order on the front

door of the bank and by publication thereof in some newspaper published in the county, to be designated by the court or judge making such order, for at least three successive weeks prior to the date thus fixed.

"Section 52. (Claims, priority, payment.) The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver, available for such purpose, be insufficient to pay the claims of depositors, the court in which the receivership is pending, or a judge thereof, shall determine the amount required to supply the deficiency and cause the same to be certified to the State Banking Board, which shall thereupon draw against the Depositors' Guaranty Fund in the amount required to supply such deficiency, and shall forthwith transmit the same to the receiver, to be applied on the said claims of depositors. Provided, however, that no part of the Depositors' Guaranty Fund shall be used to supply the deficiency that may accrue by the failure of any bank now transacting business, which bank has not filed the report provided for in section 15, receive the certificate provided for in section 14 and paid the first assessment provided for in section 45.

"Such drafts against the Depositors' Guaranty Fund shall be prorated, as nearly as may be, among the several solvent banks wherein the same is so as aforesaid kept and maintained, in accordance with the amounts thereof held by such banks respectively.

"Section 53. (Subrogation.) To the extent of the amount paid from said guaranty fund to satisfy the claims of creditors the State Banking Board for the use and benefit of said fund, shall be subrogated to all the right of the creditors thus paid, to participate in the assets of such bank and the same shall be enforced and collected by the receiver accordingly, and when collected

shall be placed in said fund and deposited by the State Banking Board in the solvent banks subject to the provisions of the Depositors' Guaranty Fund, proportionate as to the several deposits to the assessments levied against each of said banks."

The First State Bank of Holstein, and fifty-one other state banks, joined in a bill of complaint, to the Circuit Court of the United States for the District of Nebraska, against Ashton C. Shallenberger, Governor, and other state officers constituting the Banking Board created by the act, and others, praying for a decree enjoining the enforcement of its provisions, and assailing its validity because of two features, viz.: The provision restricting banking to corporate bodies, and those with respect to the guaranty of deposits. (Pp. 2-18, Rec.)

A demurrer to the bill of complaint was interposed by the defendants, challenging the sufficiency of the facts stated therein to entitle the plaintiffs to the relief sought. (P. 44, Rec.)

The demurrer was overruled, and a temporary injunction having been previously allowed, a decree was entered on the 16th day of October, 1909, making the temporary injunction perpetual. (P. 54, Rec.) The opinion of the Circuit Court in the premises is set out at pages 48 to 54 inclusive of the printed record.

The petition of the defendants for an order allowing an appeal was filed and the order entered on the 17th day of January, 1910. (P. 56, Rec.)

ASSIGNMENT OF ERRORS.

Come now the defendants and file the following assignments of error upon which they and each of them will rely

for his and their appeal from the decree made by this honorable court on the 16th day of October, 1909, in the above entitled cause.

The United States Circuit Court for the District of Nebraska, Lincoln Division, which entered the aforesaid decree, committed error against the just rights of said defendants, and each of them, for the following reasons:

First: In decreeing that the said complainants by their bill of complaint made and stated a cause of action which entitled them to a restraining order and temporary injunction.

Second: In decreeing that it appears from the said bill of complaint that the complainants have a cause of complaint, and that they have no adequate remedy at law.

Third: In decreeing that the complainant corporations, and individuals joined with them, have a joint interest in the subject matter mentioned in the bill of complaint, and that the several parties complainant are properly joined therein.

Fourth: In overruling and denying the objections to granting the restraining order and injunction prayed for in said bill of complaint, and refusing to dismiss said suit.

Fifth: In overruling and denying the demurrer of said defendants to the complainants' bill of complaint, and in ordering and decreeing that the preliminary order of injunction theretofore granted be, in all respects, continued and made perpetual.

Sixth: In holding and decreeing that the act of the legislature of the State of Nebraska, entitled "An Act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation, repealing Chapter eight (8) of the Compiled Statutes of Nebraska, of 1907, and all acts and parts of acts inconsistent herewith," approved March 25th, 1909, is unconstitutional.

Seventh: In holding and deciding that said act of the legislature is in conflict with section 1, of the Fourteenth Amendment to the Constitution of the United States.

Eighth: In holding and deciding that said act of the legislature is in conflict with section 3, article 1, of the Constitution of the State of Nebraska. (Pp. 56-58, Rec.)

By courtesy of the Attorney General of Oklahoma, we have been furnished with a copy of the brief prepared in his office in *Noble State Bank v. Haskell et al.*, No. 71, involving similar questions to those involved in the case in hand. The latter, by order of this court of October 24th, 1910, was advanced for hearing with the former as one case. The exhaustive brief filed in the former, materially lessens the labor in the preparation of a brief for the appellants in this case.

BRIEF OF THE ARGUMENT.

The errors assigned may be compressed into this sentence: *The circuit court erred in holding and adjudging that the act in question is unconstitutional.*

The grounds upon which the constitutionality of the act is assailed may be summed up in two propositions:

First: The right to engage in or pursue the business of banking is a natural right, exercisable at the pleasure of each individual, and that the provisions of section 2, restricting the exercise of such right to corporate bodies are in violation of the constitutional guarantee of liberty.

Second: That the guaranty feature of the law, which conditions the right to carry on a banking business upon the making of enforced contributions from time to time to a depositors' guaranty fund, to be used in the pay-

ment of the claims of depositors of such banks as may become insolvent, is in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," and with section 3, article I of the Constitution of the State of Nebraska, which provides, "No person shall be deprived of life, liberty or property without due process of law."

The learned Circuit Court did not pass directly on the first of the foregoing proposition, but based its decision, holding the act unconstitutional, upon the second. (Pp. 48-54, Rec.)

Whether we consider the one proposition or the other, or both of them, the final test is, whether the act is a legitimate exercise of the police power of the state? This question involves two others, which will be stated and discussed separately.

I.

IS BANKING A PROPER SUBJECT OF LEGISLATIVE CONTROL?

At this late day it is hardly necessary to undertake to discuss that question. It is well answered in *State ex rel. Woodmansee*, 1 N. Dak. 245, 11 L. R. A. 420, in these words:

"But, on the other hand, it is conceded that the business of banking, by reason of its very intimate relations to the fiscal affairs of the people, and the revenues of the state, is and has ever been considered a proper subject of legislative control, and strictly within the domain of the internal police power of every state. As a matter of fact,

we have been unable to find an authority, and we have searched dilligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking."

To the same effect are the following:

Morse in his treatise on Banking, p. 1.
People v. Barton, 6 Cow. 290.
People v. Insurance Co., 15 Johns. 358.
People v. Brewster, 4 Wend. 498.
Nance v. Hemphill, 1 Ala. 551.
Austin v. State, 10 Mo. 591.

As a matter of fact and of common knowledge, every state in the Union acts upon the assumption that banking is a legitimate subject of legislative regulation, and has enacted laws for its regulation and control. In Mill on Liberty, c. 4, the whole question is disposed of in these words: "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it."

A more serious question is this: *Is it not competent for the legislature to restrict the right to engage in banking to such as are authorized by a charter granted by the state; that is to say, to make it, instead of a common right, a right lawfully exercisable only under a franchise granted by the state?*

This involves a brief study of the nature and history of banking. In *Mercantile National Bank v. New York City*, 121 U. S. 138-156, this court said:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; * * *"

Again, in *Bank of August v. Earle,* 13 Pet. 519-595, it was said:

"At common law the right (banking) in all its ramifications belonged to individual citizens, and might be exercised by them at pleasure."

In *Exchange Bank v. Hines,* 3 Ohio St. 1-31, the court used this language in defining the functions of a bank:

"The business of banking, in its most enlarged signification, includes the business of receiving deposits, loaning money, and dealing in coin, bills of exchange, etc., besides that of issuing paper money."

As late as 1839, Mr. Webster, in *Bank of Augusta v. Earle, supra,* said in the course of his argument:

"What is that, then, without which any institution is not a bank, and with which it is a bank? It is the power to issue promissory notes with a view to their circulation as money."

Under the head of Banking, in the Encyclopedia Britannica, New Am. Supp., p. 315, is the following:

"It was, for example, formerly generally allowed to be a part of the business of a banker to borrow money by issuing promissory notes payable to bearer, which passed from hand to hand as money, within the sphere of the operations of the banks, and banks thus borrowing were called banks of issue; but it has been contended of late years that the function of issuing notes passing by delivery as money should be reserved for the state, or for some institution controlled and directed by the state."

At page 327 of the same book is the following:

"The reasons of convenience which justify a prohibition of the liberty of issue are, first, that experience has shown that this process of borrowing is too potent and too easily abused to the precipitation and aggravation of commercial crises; and, secondly, that the great and al-

most insuperable difficulty of refusing to receive notes which have obtained general currency makes it most desirable that such notes should possess some better guarantee than can be forthcoming of the solvency of private issuers."

In *People v. Utica Ins. Co.*, 15 Johns. 358, 8 Am. Dec. 243-250, it was said:

"It may safely be admitted that formely the right of banking was a common law right belonging to individuals, and to be exercised at their pleasure. It cannot, however, admit of doubt that the legislature had authority to regulate, modify or restrain that right. This they have done by the restricting act of 1904. * * * The right of banking, therefore, by any company or association, has, since the restricting act, become a franchise, or privilege, derived from a grant of the legislature, and subsisting only in such companies or associations as can show such grant."

Now we have seen that, at common law, one of the functions of a bank was the issuance of promissory notes to circulate as money. Indeed, according to Mr. Webster's question in *Bank of Augusta v. Earle, supra*, whether an institution possesses that power is the test as to whether it is a bank. But it is a matter of history that the right to engage in that branch of banking has passed from a common law right, exercisable at the pleasure of the citizens, to a right which may be lawfully exercised only under a franchise from the state. If one branch of the business may be thus transformed, may not all the other branches? The reasons justifying such a change are stated in the last quotation from the Encyclopedia and apply with equal force to the business of receiving money on deposit. Like the issuance of notes to circulate as money, "experience has shown that this process of borrowing is too potent and too easily abused to the precipitation and aggravation of commercial crises,"

and that deposits, as well as notes issued to circulate as money, "should possess some better guarantee" than can always be forthcoming of the solvency of a bank or banking institution.

Zane on Banks and Banking, 7 to 15, inclusive, discusses this proposition, and in section 8 says:

"All the courts seem to have recognized that the power to issue notes to circulate as money could be made a franchise. No one seems to have ever questioned the right of the legislature to make the power to issue currency a franchise grantable by the state. It is put on the ground that the government has the power to protect its subjects from a worthless currency. If the legislature can take away one branch of banking from private citizens for the public good, it would seem to follow as a matter of strict logical deduction that all branches of the business could be made franchises."

As a matter of fact, since 1895, it has been unlawful for any person to engage in banking in the State of Nebraska, without first obtaining a charter. (Sections 5-7, ch. 8, Compiled Statutes of Nebraska, for 1895.) It is somewhat significant in this connection, that in their bill of complaint, as well as in their argument before the Circuit Court, plaintiffs laid stress on the fact that they were engaged in banking under franchises granted by the state, and invoked the doctrine of the Dartmouth College case for the protection of their charter rights. The significance of those acts, amounting to a construction of the banking laws of the state by their own counsel, it not lessened by the fact that under the constitutional provisions of the state, the doctrine announced in the case referred to was not applicable. Those provisions are as follows:

"No bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

Sec. 16, art. I, Constitution of Nebraska.

"No corporation shall be ceated by special law, nor its charter extended, changed or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed."

Sec. 1, art. XI*b*, Constitution of Nebraska.

If, then, the right to engage in banking may be made to depend upon a franchise granted by the state, it would follow that the act in question is not an abuse of legislative discretion, for it is elementary that the sovereign may attach such conditions to a grant as he may see fit, and that one seeking or enjoying a franchise will not be heard to complain of the terms upon which it is granted. But however the court may view that proposition, the authorities cited leave no doubt of the right of a state to enact laws regulating banking. In other words, *we may safely assume that banking is a proper subject of legislative regulation and control, and proceed to an examination of the second question.*

II.

IS THE ACT IN QUESTION AN ABUSE OF THE POWER OF THE STATE TO REGULATE AND CONTROL THE BUSINESS OF BANKING?

At the threshold of this inquiry we are met with the proposition, that the act comes before this court attended by the presumption of validity.

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

Sinking Fund Cases, 99 U. S. 718.
Powell v. Pennsylvania, 127 U. S. 678.

While it is true that legislation having for its object the regulation of a lawful business must be reasonable, and not unnecessarily oppressive (*Lawton v. Steele*, 152 U. S. 133, 137), a large discretion is vested in the legislature to determine their reasonableness and adaptation to the end sought.

Mr. Justice Peckham, in *Gundling v. Chicago*, 177 U. S. 183, used this language:

"Regulations respecting the pursuit of a lawful trade or business are of frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal intereference."

In *Lawton v. Steele, supra*, Mr. Justice Brown, after enumerating some of the subjects falling within the police power of the state, said:

"Beyond this, however, the state may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the particular interests of the public require, but what measures are necessary for the protection of such interests."

In support of his position, he cited the following:

Barbier v. Connolly, 113 U. S. 27.
Kidd v. Pearson, 128 U. S. 1.

The Supreme Court of Wisconsin, in *State v. Critten-*

den, 107 N. W. 500, speaking of the police power at page 517, said:

"It is commonly said that it extends to and permits legislation 'regulating' reasonably 'all matters appertaining to the life, limbs, health, comfort, good morals, peace and safety of society'; in short to all which promotes the public welfare. * * *

"The significant word 'reasonable,' as above used, is not often found in defining the police power. It should never be omitted in defining the constitutional scope thereof. * * *

"So legislation referring to police authority for legitimacy, like any other exercise of the lawmaking power, must bear the test of constitutional limitations, which will be found upon all sides. On the one side it may meet the barrier of an express prohibition; on another the implied prohibition of any law not in harmony with the all prevailing purposes of the constitution; on another the implied inhibition involved in the declaration that 'the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles, and at last the limitation of reasonableness springing from the whole constitutional scheme. At that point, as before indicated, the judiciary holds the scales. The legislature is the sole judge of what is expedient, but the judiciary is the judge as to what is beyond the boundaries of reasonable regulation and in the domain of destruction, reasonable doubts in all cases being sufficient to sustain the former. * * *"

Citing:

Marbury v. Madison, 1 Cranch (U. S.), 137.

State v. Namias, 49 La. Am. 618, 62 Am. St. Rep. 657.

State v. Vanderslins, 42 Minn. 129, 6 L. R. A. 119.

In *Logan & Bryan v. Postal Telegraph & Cable Co.*, 157 Fed. 570 (head note 9), is the following:

"Under the police power it is within the power of a state to exclude everything which is dangerous to its

citizens, their health or morals, or which may cause them to be defrauded."

In *Otis v. Parker*, 187 U. S. 606, Mr. Justice Holmes, who delivered the opinion of the court, said:

"It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals is not conclusive upon the courts. *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. * * * Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented, except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by the fundamental law."

The extent to which private rights may be invaded, where the public good demands it, is well illustrated in *Offield v. New York, etc., R. Co.*, 203 U. S. 375. That case involved the constitutionality of an act of the legislature of Connecticut which provided that in case any railroad company, acting under the authority of the laws of

that state, should have acquired more than three-fourths of the capital stock of any steamboat, ferry, bridge, wharf or railroad corporation and could not agree with the holders of outstanding stock for the purchase of the same, such railroad company might, upon a finding by a judge of the superior court that such purchase would be for the public interest, cause said outstanding stock to be appraised in accordance with other provisions of the act, and that when the amount of such appraisal should have been paid or deposited, as therein provided, the stockholders whose stock had been thus appraised should cease to have any interest therein, and on demand should surrender all certificates for such stock, with duly executed powers of attorney for transfer thereof to the corporation applying for such appraisal. This court held that the act was valid.

In *Railway Co. v. Humes*, 115 U. S. 514, this court quoted with approval from the language of Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, the following:

"It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures. * * * The court is not a harbor where refuge can be found from every act of ill-advised and oppressive state legislation."

The learned Justice just quoted, in *Powell v. Pennsylvania*, 127 U. S. 678-686, involving the validity of the oleomargarine legislation, said:

"If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling unwholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary."

Mr. Justice Harlan, in *Chicago, B. & Q. R. Co.*, 200 U. S. 561, 26 Sup. Rep. 341-350, said:

"If the means employed have no real, substantial relation to public objects which the government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

Without citing further authorities, we think it may safely be said, *that where the legislature undertakes to regulate a trade or business which is a proper subject of legislative control, and the means employed have a real, substantial relation to the end sought, such means will not be declared unconstitutional on the ground that they are unnecessarily arbitrary, oppressive, or unjust, unless those characteristics are so manifest as to leave no room for doubt in reasonable minds.* In other words, the adoption of measures for the regulation and control of any such trade or business, amounts to a legislative finding that such measures are not unnecessarily arbitrary, oppressive, or unjust, which is analogous to the finding of a jury on a question of fact, and will not be set aside by the reviewing court, unless so clearly wrong that reasonable minds could not differ with respect to it.

Laying aside for the present the question whether the features of the act which are complained of are unnecessarily arbitrary, oppressive or unjust, it may be assumed we think that those features bear a real, substantial relation to the end which the legislature sought to accomplish by this act.

Banking is a business *sui generis*. It is the only business that thrives on its liabilities, payable on demand, and whose solvency at all times depends upon the chance

that comparatively few of such liabilities will be presented for payment on any one day. Other branches of business may thrive on borrowed capital, but a bank cannot thrive without it. Among its operations are the issuance of notes for circulation as money (*Mercantile Nat. Bank v. New York City*, 121 U. S. 138-156); buying and selling exchange, receiving deposits and holding them subject to order and loaning money (*Exchange Bank v. Hines*, 3 Ohio St., 1-31). Perhaps its most important function, at the present day, is that of collecting and receiving on deposit the idle money of a community, and loaning it out to be employed in useful enterprises. Bank paper has largely superseded money in commercial transactions, and the check book has supplanted the pocket book of other days. In the every day transactions of life the citizen today deals with the bank, directly or indirectly, not as a matter of choice, but of necessity. The banking business has become so interwoven with the commercial and industrial life of the country, that the closing of a bank operates as a great public inconvenience and hardship, and often to wide-spread commercial disaster.

A banking regulation, therefore, that should not have among its objects the prevention of the involuntary closing of a bank would be obviously defective. That is the object of the two provisions complained of by those assailing the act in question. Section 2, as we have seen, restricts the right to engage in banking to corporate bodies. This insures against the closing of a bank through the death of the proprietor. The guaranty feature of the law was designed to give confidence and assurance to depositors, and in that way to lessen the liability of a bank to be closed by what is commonly known as "a run on the bank." Such "runs" are not caused by any sudden need of money by the depositors,

but by a feeling of apprehension on their part that the bank is unsafe and their deposits in jeopardy. The disastrous effect to the public of a "run on a bank" is so much a matter of common knowledge, that one who is responsible for it is regarded as a public enemy. Any provision having a tendency to assure depositors that their money is safe and will be ultimately repaid to them, lessens the likelihood of a "run on a bank" and has a real, substantial relation to the object sought by the legislation. *While this feature of the law would necessarily operate to the advantage of the depositors, the ultimate purpose of it is to protect the public against the disastrous consequences resulting from the closing of a bank.*

We come now to this question: *Is the provision restricting banking to corporations, and those providing for the guaranty of deposits, so manifestly and unnecessarily arbitrary, unjust, or oppressive that reasonable minds cannot differ with respect to them?*

We shall first deal with the restrictive feature. We have already shown the real and substantial relation that feature bears to one of the objects of the act, namely, to insure against the closing of a banking institution by the death of a private banker. It also insures a combination of capital, energy and ability, and against the indiscretions and weaknesses of a single individual, and guards against the investment of the assets of the bank in outside ventures. It insures a publicity with respect to the operations of the bank that would not be possible were natural persons permitted to engage in banking.

Dealing with the question of the right of a state to restrict the business of banking to corporations, the Supreme Court of Wisconsin, in *Weed et al. v. Berge et al.*, 124 N. W. 664, said:

"* * * There are at least two well-defined dangers to the public which are and must be present in private banking which are eliminated in corporate banking. The first of these is the danger that the private banker, by engaging in outside business ventures, may subject his banking assets to the claims of business creditors, and thus greatly prejudice, if not destroy, the remedies of bank depositors, and the second is the danger and inconvenience which is likely to result when a private banker dies and the business has to be temporarily suspended for the purpose of probating the estate, involving perhaps destruction of public confidence and a run on the institution."

The act restricting the business to corporate bodies was there sustained as a valid exercise of the power of the state to regulate the business. A like conclusion was reached by the Supreme Court of North Dakota, in *State ex rel. v. Woodmanse, supra.*

The same question arose in *Meyers v. Irwin*, 2 Serg. & R., 367-372, where is was disposed of by Yeates, J., in these words:

"I have no hesitation in saying, that the act of March 26th, 1808, had not the effect ascribed to it on the part of the defendant and that the act of March 19th, 1810, was perfectly constitutional. It impaired no preceding contract, nor annihilated any vested right, for none such existed. It was prospective in its provisions, and was a measure of sound policy dictated by an honest regard for the public weal. Of course it became a valid law binding on all the citizens of the state, and until it was repealed, it was unlawful after the 1st of May, 1810, for any association of persons who then were, or thereafter might be connected for the purpose of banking, and who were not incorporated by law, to loan any sum or sums of money upon any actual or accommodation note or notes, or to do or perform any other act which an incorporated banking company might lawfully do."

Dealing with the analogous business of insurance, in

Commonwealth v. Vrooman, 30 Atl. 217, 44 Am. St. 603, where the constitutionality of an act restricting the right to engage in the insurance business was assailed, the act was sustained by a divided court. In the body of the majority opinion is this language:

"Such statute does not prohibit the business of insurance, but regulates it. It says to all persons interested: 'If you wish to embark in this business, you must secure a charter of incorporation, so as to subject your business to the visitorial powers of the state. If you will not do this, you must not engage in insurance against fire at all.'"

In *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. 291, the constitutionality of an act limiting the right to conduct the building and loan business to incorporated associations was raised.

The first head-note to the case is in these words:

"The legislature has power to limit the right to conduct the building and loan business to incorporated associations."

In the body of the opinion the court employed this language:

"It is to be noticed that there is no attempt to absolutely prohibit the carrying on of such business, and the cases involving the constitutional right to engage in a form of business activity not injurious to the public are not in point. The question is as to the right to discriminate between classes by way of regulation of the business. That such discrimination may be made, when based on a reasonable distinction, involving the public welfare, cannot be questioned; and if the distinction between classes is reasonable and not purely artificial, and the statute is applicable to all who come within the limits of the classification, its constitutionality cannot be questioned."

As opposed to the cases just cited stands *State v. Scougal*, 3 So. Dak. 55, as the single discordant note, so

far as we have been able to find, and its value as a precedent is much impaired by a peculiar provision of the constitution of that state, which would seem to stand in the way of any other conclusion than that reached by the court in that case.

We come now to the guaranty feature of the act. Speaking generally it provides for an enforced constribution from each bank, as follows: Within sixty days after the taking effect of the act, one-fourth of one per cent of the average daily deposits; on the first day of January, 1910, a like amount; and a like amount every six months thereafter to and including the first day of January, 1911; on the first day of each July and January thereafter, one twentieth of one per cent. If the fund thus raised, from any cause should be reduced before July first, 1910, to an amount less than one-half of one per cent of the average daily deposits, or should thereafter be reduced to an amount less than one per cent of such average, special assessments may be levied to supply the deficiency. (Sec. 45.) The act also allows special assessments when required to pay the depositors of an insolvent bank, not, however, exceeding one per cent of the average daily deposits in any one year. (Sec. 47.) Such assessments are not withdrawn from the several banks, but remain in their custody as a special fund, until required for the purpose stated.

Here we may call attention to what we conceive to be the fundamental fallacy in the conclusion reached by the learned Circuit Court, and that is, proceeding on the assumption that these assessments are in the nature of taxes levied against banks, for the benefit of private individuals. The very title of the act shows that it had for its object, not revenue, but regulation. The same may be said of its several provisions. *It is not an attempted*

exercise of the taxing power, but of the police power by the state. While the guaranty feature of the act operates as a guaranty to depositors, such result is merely subsidiary to the real purpose of the act, which is, to protect the public against the disastrous consequences of bank failures, often precipitated by unfounded apprehensions on the part of depositors as to the safety of their deposits. The distinction is well stated in *Coster v. Tidewater Co.*, 18 N. J. E. 518-523, where the court said:

"The legislative power is not competent to take the property of A and transfer it to B, simply for the benefit or convenience of B, because such an act has no public aspect; it concerns and affects, exclusively, the two individuals. In such case, it would be within the authority of the judiciary to pronounce such transfer unconstitutional and void. But if the sequestration of the property of A will, to a material extent, be serviceable to the public at large, whether such sequestration shall take place, must be committed, as a pure matter of discretion, to the legislature, provided such discretion be exercised in good faith, and does not rest, incontrovertably, upon a false foundation. Applying this rule to the facts of the present case, it seems to me that no person can deny that the decision which the legislature has made, to the effect that the project provided for in the act, at present considered, is an authorized act of legislative authority, has in it elements of public utility, and that, consequently, this court has not the power to review such decision. * * * The object proposed, and for which provision is made in the statute under review, being, then, one tending to the benefit of the community at large, must be regarded, upon principles which are too valuable to social interests to be disturbed, as coming conclusively under legislative control. The objection raised on this foundation in the argument, consequently, is not solid."

As was said by the Supreme Court in *Jacobson v. Massachusetts*, 197 U. S. 26:

"There are manifold restraints to which every person is necessarily subject for the common good. On any other

basis society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. * * * This court has more than once recognized it as a fundamental principle that 'persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged principles ever can be made, so far as natural persons are concerned. * * * The possession and enjoyment of all rights are subject to such reasonable conditions, as may be deemed by the governing authorities of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint, under conditions essential to the enjoyment of the same rights by others.' "

And in *Adams Express Company v. State*, 160 Ind. 346:

"It has never been denied that in the exercise of the police power property rights may be sacrificed, natural privileges curtailed, and liberty restricted or taken away. As the public peace, safety and well-being are the very nature and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common law rights of some citizens or deprives them of such rights."

The guaranty feature does not appear to differ in principle from the acts to be found on the statute books of almost all the states, providing for a system of examinations of banks, and assessing a portion, at least, of the expense of the examination to the respective banks. The only conceivable object of bank examinations is that they operate as an assurance to the public of the solvency of the banks. When a bank examiner investigates and

passes upon the solvency of a bank and pronounces it solvent, that is in the nature of a guaranty to depositors that their money is safe. The bank charged with the expense of such investigation, to the extent thereof, as certainly makes an involuntary contribution as a guaranty to depositors, as would those operating under the act in question. In both cases, the benefit to the patrons of the banks is incidental to the benefit of the public.

The fact that the law operates to the direct advantage of depositors, does not invalidate it. South Carolina enacted a law creating a railway commission, for the protection of the patrons of such roads. It required the cost thereof to be paid by the railroads. It was before this court in the *Gibbes Case*, 142 U. S. 386. There Mr. Justice Field used this language:

"If the tax were levied to pay for services in no way connected with the roads, as, for instance, to pay the salary of the executive or judicial officers of the state, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations, and of their not receiving equal protection of the laws."

In *Cooley v. Board of Wardens*, 12 How. 298, this court upheld a law levying pilotage fees on vessels, a portion of which went for the relief of distressed pilots. There Mr. Justice Curtis said:

"Whether these sums shall go directly to the use of the individual pilots, by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested."

In *The Town of Wilton v. The Town of Weston*, 48 Conn. 325, the constitutionality of an act was challenged, which provided that the damage done by dogs to sheep or cattle, proved to the satisfaction of the selectmen to have been committed in any town, should be paid by such town and that the town might recover damages from the owner or keeper of the dog, if a resident of the town, but if a resident of another town, then of such other town. The act also provided for a special tax or license, to be collected of the keepers of dogs. There, as here, it was urged, in substance, that the effect of the act was to take the property of one man for the benefit of another, and that it was against natural right and justice. The court overruled the objections, and sustained the law. Similar acts have been sustained in other states.

See

Tenney v. Lentz, 16 Wis. 566.
Van Horne v. People, 46 Mich. 183.
Holst v. Row, 39 Ohio St. 340.

In *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, this court upheld a quarantine regulation imposing a fee for the examination of a vessel putting into the ports of the state, a part of which going to to the salary of the examining officers and the balance to quarantine expenses. And in numerous cases, the constitutionality of acts placing the expense of the supervision of public utilities of the companies operating them has been sustained. Among such cases are the following:

Charlotte, etc., R. Co. v. Gibbes, 141 U. S. 386.
New York v. Squire, 145 U. S. 175.
Morgan v. Louisiana, being *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 98.

See also, as bearing upon this proposition, the following:

County of Mobile v. Kimball, 102 U. S. 691.
Firemen's Benevolent Ass'n. v. Louisbury, 21 Ill. 511.
Fire Department, etc., v. Helfenstein, 16 Wis. 142.
Trustees, etc., v. Roome, 93 N. Y. 313.
Phoenix Ins. Co. v. Fire Dep't, etc., 42 L. A. R. 468.
San Francisco v. Liverpool, etc., Ins. Co., 74 Cal. 133.

In every one of the cases cited lurks the ostensible feature of taking private property for other than a public purpose, or of taking the property of one man for the benefit of another; but in each the court was able to look beyond the present, ostensible object, and discern the true end and purpose of the legislation to be to serve the public weal.

We have already seen that the issuance of promissory notes, payable on demand and to bearer, designed to circulate as money, is one of the functions of a bank. Such notes, of course, like demand deposits, are obligations of the bank. If a guaranty fund to secure the payment of such notes is within the legitimate scope of legislative action, then it would seem to follow that there is no constitutional objection to a provision for the guaranty of other bank liabilities. As early as 1829, the legislature of New York enacted a guaranty law. It is discussed in the following cases:

Matter of Lee Bank, 21 N. Y. 9.
Cases of Reciprocity Bank, 22 N. Y. 9.
People v. Walker, 72 N. Y. 502.

A like law was passed by the legislature of Vermont in 1831. It is discussed at some length in

Elwood v. State, 23 Vt. 701.
Receiver v. State, 39 Vt. 92.

The legislature of Iowa, in 1857, passed a similar law, for the guaranty of state bank circulation.

It is significant, that in none of these three states was the constitutionality of the guaranty feature called in question. In each instance, the ostensible object was the protection of the holder of bank notes, but the ultimate object was, to protect the public against the recklessness and improvidence of banks and banking institutions. In each instance, the legislature acted upon the doctrine announced by Lord Chief Justice Hale more than two centuries ago, and quoted with approval by this court in *Munn v. Illinois*, 94 U. S. 113:

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the public good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

Bank paper is bank paper, and bank liabilities are bank liabilities, by whatever name they may be called. And when we take into account the fact that bank paper today serves the purposes of money to an extent unknown in the days of state bank circulation proper, it is not hard to understand that the reasons underlying the guaranty of state bank circulation are equally potent in support of the guaranty of bank deposits in these times.

The act in question was passed at a time when the commercial disturbances of 1907 were fresh in the minds of the people. It was a matter of common knowledge, that during those disturbances many a bank with ample assets to meet its liabilities in ordinary times, was forced to close its doors merely because its depositors were seized with a panic, and rushed to withdraw their deposits, not

because they required them for present use, but because of widespread apprehension of the solvency of the bank in which they were kept—that their money thus kept might be tied up indefinitely and ultimately lost to them. Any measure having a tendency to allay that apprehension must have a real and substantial relation to the public good—must serve a useful purpose, and the fact that to accomplish that purpose involves a benefit to a select class of private individuals does not invalidate the act, which is in no sense a measure of taxation, but a police regulation whose ultimate purpose is the common good.

The assessments are not oppressive; they are restricted within reasonable limits. The general assessments, after January 1st, 1911, amount to but one-tenth of one per cent annually, and special assessments are restricted to one per cent in any one year. The history of banking shows that they could never become burdensome. *The court will distinguish between a law providing for such limited assessments, and similar acts wherein the only limit is the amount required to pay the depositors of insolvent banks.* The total losses to depositors from the failure of banks during the first forty-four years following the establishment of the National Banking Act were a trifle over $33,000,000, or an annual loss of about $71,704. The tax on the average deposits payable on demand to meet these losses would have been about thirty-seven one-thousandths of one per cent. Under the act in question, the fund remains in the respective banks until required for the payment of depositors. The assessments cannot differ greatly in degree from the pilot fees, the assessments exacted from insurance companies for fire companies, and from those operating public utilities for examinations, etc., and in principle there is no difference, —each has for its object the public good; each is a police regulation having a substantial relation to the public welfare.

In conclusion we repeat, that directly in the way of those assailing the act in question lies the wholesome rule that legislative acts are presumptively valid; that they are not to be set aside on light or trivial grounds. The act may not be the product of the highest wisdom, but it bears the marks of a desire to serve the public good. Its wisdom, or lack of it, does not concern the court, so long as it is within the legitimate scope of legislative action. It was designed to allay distrust of banks and the banking system at times when such distrust spells commercial disaster. While it may not be the best means to that end, it cannot be fairly said that it does not serve it in some measure. It is the will of the people of the state expressed by their chosen representatives, and as such, comes before this court attended by the presumption of validity.

ARTHUR F. MULLEN,
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AND
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For Appellants.

AND

GRANT G. MARTIN,
DEPUTY A. G. OF NEBRASKA.

FILED
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JAMES H. MALONEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910

No. 445

ASHTON C. SHALLENBERGER, GOVERNOR OF THE STATE OF NEBRASKA; SILAS R. BARTON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

v.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, ET AL.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF NEBRASKA.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS.

CHAS. O. WHEDON,
For Appellants.

STATE JOURNAL CO., LINCOLN, NEBR.

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No. 445.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF NEBRASKA.

BRIEF AND ARGUMENT FOR APPELLANTS.

The Legislature of Nebraska at its thirty-first session, 1909, enacted a law entitled

> "An Act for the Regulation, Supervision and Control of the Business of Banking, and to provide penalties for its violation, repealing Chapter eight (8) of the Compiled Statutes of Nebraska of 1907, and all acts and parts of acts inconsistent herewith." (Laws of Nebraska 1909, page 66.)

A copy of the act is set out at length in the printed record commencing at page 18 and extending to page 37.

Under the previous law, repealed by the last act, if it be valid, the Auditor of Public Accounts, Treasurer and

Attorney General constituted the State Banking Board. Under the new law the State Banking Board consists of the Governor, Auditor and Attorney General. Under the former law the Board had the power to appoint its Secretary. Under the last act the Governor has the power to appoint a Secretary. The defendant Royce was the Secretary under the old law while the defendant Patterson had been appointed Secretary by the Governor under the new act.

The plaintiffs below, hereinafter designated as the banks, filed their bill in the Circuit Court praying that the defendants, hereinafter designated as the State, the Auditor, the Treasurer, and the Attorney General, be enjoined from enforcing any of the provisions of the act of 1909, and that defendant Patterson be enjoined from exercising any of the powers conferred upon him under the appointment and commission of the Governor.

The State objected to the granting of a restraining order or injunction (page 42, Printed Record), and demurred to the bill (page 44).

The objection and the demurrer were argued at the same time and the cause submitted upon the bill and demurrer. The court overruled the demurrer and granted a perpetual injunction against the enforcement of the act of 1909. See page 54 Printed Record for the final decree making perpetual the temporary injunction found at page 46.

The complaint here made is that the Circuit Court erred in holding that the law in question was in conflict with the Constitution of the United States and void.

The sections of the act which I deem necessary to here set out are as follows:

> "Sec. 2. It shall be unlawful for any corporation, partnership, firm or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by

means of a corporation duly organized for such purpose under the laws of this state. It shall be unlawful for any corporation to receive money upon deposit or transact a banking business under the laws of this state until said corporation shall have complied with all the provisions and requirements of this act. Any violation of the provisions of this section shall subject the corporation, partnership, firm or individual so offending to a penalty of twenty-five ($25.00) dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business."

"Sec. 11. It shall be unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business in this state without having first obtained a charter from the State Banking Board in the manner hereinafter provided, which charter shall issue only to corporations duly organized for the transaction of such business."

I.

The first question which will be considered is this:

In view of the provisions of the Constitution of the United States, may the State of Nebraska, in the exercise of its legislative power, prohibit an individual or an aggregation of individuals, not incorporated, from engaging in the banking business within its jurisdiction?

In determining the question of the validity of the Nebraska statute under consideration this elementary rule is not to be forgotten: that every reasonable construction must be resorted to in order to save the statute from unconstitutionality.

Parsons v. Bedford, 3 Peters, 433, 448.
United States v. Coombs, 12 Peters, 72, 75.

Grenada County Supervisors v. Brogden, 112 U. S., 261.
Presser v. Illinois, 116 U. S., 252, 269.
Hooper v. California, 155 U. S., 657.

It is contended that the statute in question is invalid because in conflict with the proposition stated in the Declaration of Independence and the first section of the Constitution of the State of Nebraska that all men are endowed by the Creator with certain inalienable rights, and among these are the right to pursue happiness, which, it is said, include the right to pursue any lawful avocation.

With whatever reverence or veneration we may regard the Declaration of Independence, everybody knows that it is, at least, just what its preamble declares it to be, a declaration of the causes which led the colonies to dissolve the political bonds which connected them with the government to which they had previously rendered allegiance impelled by "a decent respect to the opinions of mankind." Everybody also knows that it declares some things to be self-evident which, when applied to organized society or government, are neither self-evident nor capable of demonstration. That is inalienable which cannot be alienated. But the fact that the State, which is but an organization of individuals, deprives some men of their lives and others of their liberty, in either case depriving them of their right to pursue happiness, because of a violation of its laws, is a complete answer to the "fundamental proposition" that the right of the individual to life, liberty and the pursuit of happiness is inalienable, when applied to organized society. These natural or so-called inalienable rights are the rights which the individual, as has been said, "throws into the common stock as his contribution to society." Every man has the natural right to think and this right is inalienable; he may think in church during the progress of religious services

and upon any subject towards which his mental faculties incline. He also has the natural right to speak, but that right is alienable. He may not speak in church to the disturbance of the religious services then in progress without violating the statute. It may be said that such statutes are enacted for the peace and best interests of society. But who is to determine what is for the peace and best interests of society if not the State, the people voicing their will through their duly chosen representatives? If the State shall say that it is for the best interests of society that private individuals or copartnerships shall not engage in the banking business, can the individual or copartnership establish the proposition that what the State has said is for the public welfare, for the best interest of society, is invalid because it is in violation of inalienable individual rights? Probably every man has the natural right to judge his own case, to avenge his own wrongs, but as a member of society he must surrender that right; he must and does consent that that right is alienable.

* * *

Every individual as a member of society, as a citizen of the State, must concede the alienability of his natural or so-called inalienable rights for the practical enforcement and enjoyment of which he must call for the aid of society; in other words, for the practical enforcement and enjoyment of which he must rely upon the laws of the State. Statutes prohibiting hunting, fishing, sporting and common labor on Sunday, are secular in their character and not religious. They are based not simply on moral grounds but upon the proposition that periods of rest are requisite to the physical well-being of the people. I may not hunt on Sunday, not because I take game which is under the protection of the State; I may not hunt on Monday save at certain seasons and then only to a limited extent, because a majority of the people have determined

and expressed their conclusion by means of a statute that my natural right to hunt on Sunday has been alienated, and to that alienation I have consented.

An individual wishes to engage in the banking business; all admit that the state has the right to regulate that business; to say how much capital a bank must possess, when it shall be paid, and how; to provide for bank examinations and reports; under what condition the bank shall not receive deposits, declare dividends or diminish its capital. All these things and others that might be mentioned go to the establishment of the banking business; without them there is no such thing as banking business; no such vocation as banking. With these matters, resulting in the establishment of the banking business, the individual, as such, has nothing whatever to do; he relies entirely upon the rules of society, the statute, for the legal establishment and operation of the bank. But the banks contend that after the bank has been established according to the rules of the State the individual may come in and say that in this business which the State has created and established and to which creation and establishment the individual, as such, contributed not an iota, he has an inalienable right to engage. If the individual possesses such a right then the rules and restrictions prescribed by law regarding the banking business are invalid because in conflict with the natural or inalienable right of the individual to engage in that business. If the individual has this inalienable right, then as to him, the state has no right to prescribe the amount of capital required before a bank shall receive deposits, or to make any rules or regulations whatever. Necessarily the individual must surrender some of his rights to society, and he surrenders the most valuable of all the so-called inalienable rights when he concedes the right of society to deprive him of life or liberty when he violates its rules.

It was said by Mr. Justice Bradley in *Butchers Union Company v. Crescent City Co.*, 111 U. S. 762:

> "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

But if society is to be maintained must not the largest ingredient in the civil liberty of the citizen be surrendered if the public welfare so demands? Otherwise how are we to arrive at "the greatest good to the greatest number"? The right to sell, at retail, intoxicating liquors has been one of the common occupations of life; too common for the common good, has been the judgment of many states which have deprived their citizens of it. Is this one of the inalienable rights which, to again quote the language of Mr. Justice Bradley, "was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness' "?

As a matter of abstract right the common occupation of selling beer is just as valuable as the common right of selling exchange; but who at this day will deny the right of the State to prohibit the sale of beer? The State determines that such sales are bad for society. Is the State deprived of the right to say that the selling of exchange is bad when conducted by a private individual in view of the fact that both are "common occupations

of life"? Who is to determine what is for the best interest of the State if not the State itself, speaking through its legislative department? Said this court in *Wheeler v. Smith et al.*, 9 How. 78:

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government. The sovereign will is made known to us by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the crown. The State, as a sovereign, is the *parens patriae*."

It is no answer to say that everybody knows that the sale of intoxicants is harmful; that it produces bad effects on society.

Everybody knows that the practice of depositing money in banks without security sometimes produces bad effects. The Federal government knows that now and will not deposit its money unless the deposit is secured by the receiving bank. As to public funds Nebraska has known it for several years and evinced that knowledge more than ten years ago by the enactment requiring banks receiving public money to secure the deposit.

* * *

Farther along in the same opinion Mr. Justice Bradley, after referring to patents for inventions, copyrights for books, licenses required in the pursuit of professions, said:

> "But in such case there is no real monopoly. The profession or avocation is open to all alike who will prepare themselves with the requisite qualifications, or give the requisite security for preserving public order; except in certain cases, such as the sale of intoxicating drinks, where the interests of society require regulation as to the number of

establishments as well as the character of those who carry them on. All such regulations as are here enumerated are entirely competent to the legislature to make. But this concession does not in the slightest degree affect the proposition (which I deem a fundamental one), that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects—the liberty of pursuit."

* * *

If I understand the language above used by Justice Bradley it is to the effect that as the sale of intoxicants is one of the ordinary pusuits or avocations of life such sales may be regulated; the number of places of sale limited, and the character of those who conduct the business determined; but there can be no prohibition of the traffic. But such is not the law as determined by this court. The question was presented in *Mugler v. Kansas*, 123 U. S., 623, and *Kansas v. Ziebold*, 123 U. S., 623.

Mugler had erected and furnished a brewery in Salina at an expense of $10,000, which had been used by him from its equipment in 1877 to May, 1881. He was indicted for selling intoxicants and also for manufacturing beer. An information was filed in the State Court against Ziebold praying that a brewery operated by himself and partner be adjudged a nuisance and abated. The case was removed to the United States Circuit Court where an amended bill in equity was filed praying the same relief asked in the State Court.

Mugler was convicted in the trial court; the State Supreme Court sustained the conviction and Mugler prosecuted proceedings in error. The Circuit Court dis-

missed the bill against Ziebold, and the state appealed. In this court, Mr. George G. Vest appeared for Mugler and Mr. Joseph H. Choate appeared for Ziebold. Of the ability of counsel who appeared in these cases to contest the validity of the law of Kansas, nothing need be said. By both it was argued with great ability that the law of Kansas was in conflict with the Fourteenth Amendment in that it abridged the privileges and immunities of citizens of the United States, deprived them of their property without due process of law, and denied them the equal protection of the laws. Mr. Vest, among other cases without avail, relied upon the opinion of Justice Bradley from which extracts have been hereinbefore quoted. In the opinion by Mr. Justice Harlan, page 657, it is said (123 U. S., 657):

> "The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.'
>
> "That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer.
>
> "In the *License Cases*, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the constitution of the United States. In determining that question, it became necessary to enquire

whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.' (P. 577.) Mr. Justice McLean, among other things, said: 'A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal government has no power. * * * The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed.' (Pp. 588, 589.) Mr. Justice Woodbury observed: 'How can they (the States) be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity?' (P. 628.) Mr. Justice Grier, in still more emphatic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may

safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals must come within this category. * * * It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' "

Again, at page 660:

"It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As as was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.'

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the

legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

Again, at page 663:

"No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

"This conclusion is unavoidable, unless the Fourteenth Amendment to the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U. S., 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.' "

Much more might be quoted from the opinion, but the foregoing is sufficient to show that the Supreme Court leaves it to the states, in the exercise of their police powers, to determine what tends to promote not only the public health and morals, but the *public welfare and safety* as well.

I am aware it may be urged that the use of intoxicants is so manifestly against the welfare of society that their manufacture and sale are in a class by themselves; but the case of *Mugler v. Kansas*, several times cited and reaffirmed, firmly establishes the proposition that all the common occupations of life are not open to the individual citizen, and that they may be closed to him without depriving him of any rights guaranteed by the Constitution or declared in the Declaration of Independence.

To manufacture and sell beer in Kansas was a lawful occupation. If there are any natural, fundamental, inherent or inalienable rights, Ziebold possessed them. He, in 1877, invested ten thousand dollars in the erection and equipment of his manufactory. He was in the pursuit of a lawful occupation. The legislature of Kansas in 1885 by statute declared his manufactory a common nuisance and the further sale of the commodity manufactured therein, theretofore lawful, a crime. It may be that Ziebold had to surrender a life-long occupation, in which he had gained proficiency and had correspondingly unfitted himself for another; that he was required to give up his experience in an occupation which was of itself valuable as property. Not only was the good will of his business destroyed, his occupation gone, but his manufactory and tangible property, constructed for a special purpose, was practically rendered valueless.

* * *

The right of a merchant to sell his entire stock in bulk without notice to his creditors was and is a natural right, yet a large number of the States have enacted laws forbidding such sales and these laws have been held constitutional by this court.

Lemieux v. Young, Trustee, 211 U. S., 489.

Kidd, Dater Co. v. Musselman Grocer Co., 217 U. S., 461 (decided May 15, 1910).

In those cases it was held that it was within the power of the states to enact laws requiring tradesmen making sales in bulk of their stocks in trade to give notice to their creditors and to prescribe how the notice should be given, and unless the provisions as to such notices were unreasonable and arbitrary such statutes would not amount to deprivation of property, abridge liberty of contract or deny equal protection of the law within the meaning of the Fourteenth Amendment.

The Legislature of Illinois enacted a law which declared grain option contracts to be gambling contracts and the making of them to be a criminal offense. The legislation was held by the supreme court of Illinois to be valid.

Booth v. The People, 186 Ill., 43.

It was said by that court, page 50 of the opinion:

> "As we have heretofore said, it is not without the power of the General Assembly, in the proper exercise of the police power, by an enactment otherwise valid, to declare that unlawful which was theretofore lawful, even if the act so condemned be an attribute of the right of liberty or property guaranteed to the citizen by the constitutional provisions under consideration."

That decision of the Supreme Court of Illinois was affirmed by this court. *Booth v. Illinois*, 184 U. S., 425.

It was said by the court, page 431:

> "The statute here involved may be unwise. But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But these are

> suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation."

So here; the Legislature of Nebraska has deemed the enactment in question to be wise legislation. It may be said by counsel for the banks, "There is nothing in the history of the banking business in Nebraska to justify the inference that there is any emergency or exigency for such a statute." It may be said, "The guaranty feature fund provision of the act is a phase of paternalism that is obnoxious to our system of government." The banks may assert that the statute in question is "capricious legislation." That no banks failed in Nebraska during the panic of 1907-8. I concede that in one sense none failed, while in another, the paying of their depositors on demand, all failed because they refused to honor checks drawn against deposits. But these are all for the consideration of the legislature rather than for the courts.

In *Parks v. State*, 159 Ind., 220, the Supreme Court of Indiana, speaking of the police power of the State, said:

> "To what extent must the individual right be subordinated to the public weal? Under this power various burdens are imposed: Criminals are deprived of their liberty; the implements of crime are destroyed; vice and pauperism are controlled; noxious trades are regulated; nuisances are suppressed; children are required to attend school; the construction of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employees is to be performed; the hours of work, in employments deleterious to health, limited; the employment of children in factories prohibited; pure food laws are enacted; physicians, dentists and druggists are licensed; and so the list might be almost indefinitely

> expanded by specific instances of authorized regulations, enforcing the social compact, for the protection of life, health, morals, property and the general weal of the community, until we perceive that definition is impossible and that the whole matter of the legislative element of sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left, as the Federal Supreme Court has declared, to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require."

Why may not the legislature add to the above matters which have been regulated and prohibited under the police power, the securing of bank deposits? The Supreme Court of Ohio sustained a law which prohibited the practice of healing by those classing themselves as Christian Scientists. *State v. Marble*, 72 Ohio St., 21. The State of Nebraska enacted that no female should be employed in any manufacturing, mechanical or mercantile establishment, hotel or restaurant in the state more than sixty hours during any one week and that ten hours shall constitute a day's labor. It was contended that the act was in conflict with sections 1 and 3 of article 1 of the Bill of Rights, which are in effect the same as the Fourteenth Amendment to the Constitution of the United States. The validity of the statute was called in question in the case of *Wenham v. State*, 65 Neb. 394, and the statute was sustained as a proper exercise of the police power of the State. At page 401 of the report it is said:

> "It may well be contended that plaintiff's business is property, and that the ability of the women who may be employed by him to labor, is also property. It is the means by which they earn their living, and perhaps contribute to the help of the indigent ones who may be dependent upon them in whole or in part for support. It would seem at first blush as though a law having the effect to interfere with the business of the one, or to shorten the hours of

labor of the other, would be repugnant to these constitutional provisions. It must be conceded, however, that every property holder is secured in his title thereto and holds it under the implied rule and understanding that its use may be so regulated and restricted that it shall not be injurious to the equal enjoyment of others having the equal right to the enjoyment of their property or the rights of the community in which he lives. All property in in this state is held subject to rules regulating the common good and the general welfare of our people. This is the price of our advanced civilization, and of the protection afforded by law to the right of ownership and the use and enjoyment of the property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment and to such reasonable restrains and regulations by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think expedient. This power, legitimately exercised, cannot be limited by contract, nor bartered away by legislation. It is a power that is necessarily inherent in every form of government. This inherent power, reasonably used, may be said to be due process of law."

* * *

The question is not what may be the individual opinions of those constituting courts as to the wisdom of such legislation, but what is the power of the State? As was said in *Sinking Fund Cases*, 99 U. S., 718, and repeated in *Powell v. Pennsylvania*, 127 U. S., 684:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this rule."

The general terms under which such legislation is

justified is the police power of the State, and however indefinite and difficult of exact definition this power may be it is sufficient to say that it is ample. It was said by Mr. Justice Field, voicing the unanimous opinion of the court in *Barbier v. Connolly*, 113 U. S., 27, 31:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irriga-

> ting arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarily situated, is not within the amendment."

The legal proposition enunciated in that case was reaffirmed in 144 U. S., 615; 115 U. S., 523; 118 U. S., 423; 120 U. S., 72; 123 U. S., 663; 125 U. S., 189; 127 U. S., 683; 129 U. S., 29; 134 U. S., 238; 135 U. S., 130; 136 U. S., 449; 142 U. S., 394; 146 U. S., 39; 148 U. S., 662; 151 U. S., 569; 152 U. S., 136, where it is said:

> "A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for protection of such interests";

153 U. S., 390; 161 U. S., 666; 165 U. S., 182; 169 U. S., 47; 169 U. S., 383; 174 U. S., 103; 177 U. S., 596; 177 U. S., 631; 181 U. S., 559; 207 U. S., 79; 208 U. S., 479.

* * *

The Nebraska statute in regard to banking makes no distinction between individuals; it places no unequal burdens upon any of them; it requires all, if they engage in banking, to do so by forming corporations. This is required of all persons desirous of engaging in the bank-

ing business, under the acts of Congress relating to National Banks. I have never heard it contended that these acts of Congress were invalid because they did not permit individuals as such to engage in banking. If, however, the right to engage in the banking business is a natural, inherent, inalienable right, guaranteed by the Declaration of Independence, what right has Congress to confine the issue of paper, intended to circulate as money, to corporations and place a prohibitory tax upon the issue of State banks?

* * *

In *City of New York v. Miln*, 11 Peters, 102, there was involved the constitutionality of a law enacted by the State of New York concerning passengers in vessels coming to the port of New York. It was contended that the legislation was not authorized by the Constitution and it was therefore void; that it was in conflict with the constitutional power given Congress to regulate commerce, and in opposition to that power as it had been exercised by Congress. After declaring that there was no conflict between the law of New York and the act of Congress the court say, page 138:

> "But we do not place our opinion upon this ground. We choose rather to plant ourselves on what we consider impregnable positions; they are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is

not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of the state is complete, unqualified, and exclusive.

"We are aware, that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it we should say, that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or property, of the whole people of a state or of any individual within it, and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification than by definition. No one will deny that a state has the right to punish an individual found within its jurisdiction, who shall have committed an offense within its jurisdiction against its criminal laws. We speak not here of foreign embassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offense against its laws, as to inflict punishment upon an offender after it shall have been committed. The right to punish or prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the state, is just as subject to the operation of the law as one who is a native citizen."

Again, page 142:

> "We think it as competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease."

* * *

The court cannot close its eyes to the facts of history, recent or remote. It is a well known fact that in 1907-8 banks, State and National, with few exceptions, closed their doors to their depositors so far as the withdrawal of deposits was concerned. The depositor who placed in the bank on Saturday $50, could not draw it out on Monday. Bankers justified their action upon the claim that they were protecting the depositors. If on Saturday when the depositor offered his money for deposit he had questioned the banker as to the safety of the deposit he would doubtless have been informed that the bank was safe, but if he thought otherwise he was at liberty to keep his money. On Monday when he went to draw $50 out of the bank the banker insisted upon knowing for what purpose he proposed to use the money and to determine whether the depositor actually required it. This was the banker's method of securing deposits. Very largely demands for money at that time were based upon a groundless fear that banks were insolvent. But if the deposits had been secured; if depositors had known that there was no real danger of a loss of their deposits, such demands would not have been made, such action by bankers would not have been taken.

If it is "not only the right, but the bounden and solemn duty" of the State, in the language of the opinion of this court last above quoted, "to advance the safety, happiness and prosperity of its people, and provide for

its general welfare, by any and every act of legislation which it may deem conducive to these ends"; if it is competent for the State "to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts," the State of Nebraska has in the judgment of the legislature to an extent performed that duty by the enactment of the statute in question. It has exercised a right which cannot be taken from it and which it cannot relinquish without a surrender of its sovereignty.

Said the Supreme Court of Kansas in *Blaker v. Hood*, 53 Kan., 509:

> "The confidential and trust relations which exist between the bank and its patrons, and the difficulty that the depositors and those dealing with the bank necessarily encounter in detecting irregular practices, and in ascertaining the real financial conditions of banks, are sufficient to justify inspection and control. Those engaged in the business invite all in the community to deposit their funds with them, which, when obtained, are largely used for their profit. The numerous instances where the earnings and funds of people so deposited are dissipated and lost show the necessity for measures to protect the people from imposition, extortion and fraud."

Who is to determine the measure of control that is to be exercised if not the State? And if the State shall say that to accomplish the desired control banking must be done by corporations only, must not the individual surrender his so-called "inalienable right" to engage in the banking business, for the public good?

In *Adams Express Company v. State*, 161 Ind. 346, it was said:

> *"It has never been denied that in the exercise of the police power, property rights may be sacrificed, natural privileges curtailed, and liberty restricted*

or taken away. As the public peace, safety and well-being are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with the common law rights of some of the citizens, or even deprives them of such rights." (Italics mine.)

In *Parks v. State*, 159 Ind., 211, Parks was prosecuted for practicing medicine without a license required by statute. He contended that the statute requiring the license was in conflict with the Fourteenth Amendment to the Constitution in that it deprived him of the right to follow a vocation in life. The Supreme Court of Indiana held that the statute was not in violation of individual rights. To the same effect is the case of *Walker et al. v. Jameson*, 14 Ind., 591, 596.

It was said by the Supreme Court in *Bank of Augusta v. Earle*, 13 Peters, 519, 595.

"And it is very clear that at common law, the right of banking in all its ramifications, belonged to individual citizens; and might be exercised by them at their pleasure. And the correctness of this principle is not questioned in the case of *State v. Stebbins*. Undoubtedly, the sovereign authority may regulate and restrain this right."

* * *

It is said in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 661:

"That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *Gibbons v. Ogden*, 9

Wheat., 1, 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S., 27, 31. As thus defined, we may, not improperly, refer to that power the authority of the State to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps."

In *Jones v. Brim*, 165 U. S., 182, it is said:

Embraced within the police power of a state is the establishment, maintenance and control of public highways."

Why not within the same power, the control of banks, even to the extent of declaring by statute who shall conduct the business?

The case of *Harbison v. Knoxville Iron Co.*, 103 Tenn., 421, 56 L. A. R., 316, is an interesting and instructive one upon the question here presented; it treats the subject with marked ability and reviews some of the cases cited by counsel for plaintiffs here. In that case it was said, referring to the police power of the state (page 320):

"This power is an important and comprehensive one, and its application must be expected and allowed to expand and take in new subjects from time to time, as trade and business advance, and new conditions arise. The scope of its exercise within the bounds already mentioned, is limited only by the requirement that it shall not arbitrarily and unreasonably affect the citizen in his life, liberty and property. It cannot be an excuse for oppressive legislation, * * * but it covers everything relating to the public interests, and in its exercise a large discretion is necessarily vested in the legislature, which, in the first instance, is presumed to know, not only what the welfare of the public requires, but what measures are necessary for its advancement."

The act of the Nebraska legislature does not arbitrarily and unreasonably affect the citizens of the state, because they may yet, after forming a corporation, engage in the banking business. Again, in the case last above cited it is said:

> "The legislature evidently deemed the laborer at some disadvantage under the existing laws and customs and by this act undertook to ameliorate his condition in some measure by enabling him, or his *bona fide* transferee at his election, and at a proper time to demand and receive his unpaid wages in money, rather than in something less valuable."

So here, the legislature evidently deemed the bank depositor at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by providing for the security of the deposit. This was a matter wholly within the power of the state, whether it be called police power, legislative power, or the power of sovereignty. It is not confined to the abatement of nuisances, the establishment of quarantine laws for the preservation of health, or the abolition of breweries. Said this court in the *License Cases,* 5 Howard, 583:

> "But what are the police powers of a State? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States.

> And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.
>
> "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. *It is a question of power.*" (Italics mine.)

By the statute of Nebraska marriage is declared to be a civil contract. Ordinarily such contracts are entered into with a view to the "pursuit of happiness." Yet no matter what power for good one of the parties possesses or what his or her mental ability may be, if he or she is possessed of one-fourth or more of negro blood, the contract is by statute declared to be void and the issue of the marriage illegitimate. Such marriages are by the laws of many of the states made felonies, and so far as I am advised they have never been held to be invalid. On the contrary they have been held enforceable in

State v. Gibson, 36 Ind., 402.
State v. Jackson, 80 Mo., 177.
State v. Hairston, 63 N. C., 453.
Green v. State, 58 Ala., 190.
Lonas v. State, 3 Heisk. (Tenn.), 309.

Such laws are enacted under the police power of the State. It may be answered that the admixture of blood tends to the deterioration of the white race. That is not the question. It is, as was said by the Supreme Court of the United States, *supra*: *"A question of power." Power on the part of the State to manage its own internal affairs. Power on the part of the State to determine for itself what is for the best interests of its citizens.*

Counsel for the banks will doubtless cite one case, *State v. Scougal*, 3 So. Dak., 55 (15 L. R. A., 477), which holds that the state may not prohibit an individual from engaging in the banking business. The Constitution of South Dakota contains this provision not found in the Constitution of Nebraska:

> "No law shall be passed granting to any citizen, class of citizens, or corporations, privileges or immunities which, upon the same terms, shall not equally belong to all citizens and corporations."

That provision of the constitution of South Dakota is sufficient to warrant the decision, but the court did not place its decision upon that ground alone, although it does quote the constitutional provision. Justice Corson, in his opinion, quotes from the dissenting opinions of Justices Field and Bradley in the *Slaughter House Cases*, 16 Wallace, and also from the opinion of Justice Field in the case of *Butchers, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. I here quote a part of what is quoted by Justice Corson from the opinion of Justice Field, taken from 15 L. R. A., 486:

> "The common business and callings of life, the ordinary trades and pursuits, which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be left free in this country to all alike, *upon the same terms*. The right to pursue them without let or hindrance, *except that which is applied to all persons of the same age, sex, and condition*, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." (Italics mine.)

What is there in the Nebraska Banking Act of 1909 that restricts its terms or effect to any class of persons? It applies to all the citizens of the state without regard to age, sex, or condition. No citizen, in his individual ca-

pacity, may engage in the banking business; every citizen may engage in the banking business by forming, with another or others, a corporation. Wherein is there any deviation from the rule that the banking business is free "to all alike on the same terms"? One possessed of every qualification for successful banking may not possess $5,000; has he the right to engage in the business with only a capital of $500? As to him, the law heretofore in force requiring a capital of $5,000 is prohibitive. But it is also prohibitive to all others in like financial condition, and the law applies alike to all.

* * *

In the case of *State, ex rel. Goodsill, v. Woodmanse*, 11 L. R. A. 420, the relator was held by defendant under a warrant of commitment for the alleged offense of doing business as an individual banker in violation of an act of the legislature of North Dakota which provided:

> "It shall be unlawful for any individual, firm or corporation to continue to transact a banking business, or to receive deposits for a period longer than six months immediately after the passage and approval of this act, without first having complied with and organized under the provisions of this act. Any person violating the provisions of this section, either individually or as an interested party in any association or corporation, shall be guilty of a misdemeanor, and, on conviction thereof, be fined not less than five hundred ($500) dollars, nor more than $1,000, or imprisonment in the county jail not less than ninety days, or either or both, at the discretion of the court."

This case presents the precise question now before the court. In the opinion the court say:

> "While not assailing the whole act as unconstitutional, the relator contends that section 27, above quoted, so far as it concerns individuals or firms doing busi-

ness without incorporation, contravenes both the federal and state constitutions. Counsel for relator cite section 1 of article 1 of the State Constitution, and also section 1 of the Fourteenth Amendment of the Constitution of the United States, and claim that the relator's constitutional rights and personal liberty, as secured by these organic acts, have been ruthlessly violated and taken away by section 27 of the statute, for the reason that the section, among other things, prohibits individuals from carrying on the business of banking in a private capacity, and punishes all who violate the prohibition. This contention of the relator was urged with great learning and ability by the eminent counsel representing the prisoner, but we find no support in the authorities cited for the relator for the contention. It is true that it has been held that the provision relative to personal liberty found in our constitution might be violated by the enactment of a statute which operated to deprive a citizen of the right to pursue a lawful trade or avocation. *Re Jacobs*, 98 N. Y., 98; *People v. Marx*, 99 N. Y., 377. But, on the other hand, it is conceded that the business of banking, by reason of its very intimate relations to the fiscal affairs of the people, and the revenues of the state, is and has ever been considered a proper subject of legislative control, and strictly within the domain of the internal police power of every state. As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking.

"The relator, however, complains that section 27 does not merely regulate; it goes further, and prohibits individuals from banking in a private capacity. But the prohibition of private banking necessarily results from the inauguration of a banking system for the state, in which the business is made an exclusive corporate franchise; *i. e.*, a business which can be carried on only by those who become incor-

> porated, and are willing to subject their business to the restraints and safeguards found in the Banking Law under which they acquire the right to carry on such business. It would avail little, in our view of the matter, to provide salutary rules and wholesome safeguards for the business of banking when carried on by a corporation, if at the same time private persons, firms and corporations are permitted to carry on the business unhampered by such restrictions and safeguards. But, as a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business."

It will be noticed that the court came to a conclusion adverse to that arrived at in the South Dakota case cited by counsel for plaintiffs, but as before stated, the decision of the latter court might well have been based upon the provisions of the state constitution.

In *People v. Utica Insurance Company*, 15 Johnson, 357, the question of the right of individuals to engage in banking after the passage of the act of 1804 was involved and discussed by counsel, as will be seen by reading the arguments. The constitutionality of the statute was not passed upon but assumed. At page 389 of the report it is said:

> "Had the defendants claimed and exercised the right of banking as private individuals, I agree that an information would not lie against them; they would have been subject only to the penalities inflicted by the act."

Here is a clear admission of the validity of the principle that individuals may be prohibited from engaging in the banking business.

In 1905 the legislature of Indiana enacted a law which provided in substance that every partnership, firm or individual transacting a banking business within the state, or using the word "bank" or "banker" or "banking" in connection with its business should be subject to the provisions of the act.

That from and after July 1, 1905, it should be unlawful for any partnership, firm or individual to transact any banking business unless possessed of a cash capital of at least $10,000. Such property must be in money, bank furniture and fixtures, or real estate for conducting the business, all to be set apart and to be kept unimpaired for the security of the creditors of the bank, provided that the real estate, bank fixtures and furniture should not constitute more than one-third in amount and value of the entire capital of the bank.

If the banking business was to be carried on or transacted by an individual such individual should at all times while conducting the business be a resident of the state.

Every partnership, firm or individual then or thereafter desiring to transact the banking business should file with the auditor a statement under oath showing, among other things, that the net worth of the individual members of such firm, partnership or individual is equal to at least double the amount of the capital stock paid into the bank.

In the case of *State v. Richcreek*, 167 Ind., 217, Richcreek was charged with having transacted the banking business after the law took effect without having filed with the auditor of state the statement under oath as required by the act. The affidavit upon which defendant was arrested was quashed on motion, and the state appealed to the Supreme Court. In the opinion, the court say, page 222:

"The *quasi*-public nature of the banking business, and

the intimate relation which it bears to the fiscal affairs of the people and the revenues of the State, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and usually obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion, and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interests in case of insolvency, justify inspection and control by the State. When the sovereign people of a State, acting through the legislature, find such police regulation necessary to protect public health, safety or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision, yet when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with the constitutional guaranties."

Again, at page 224:

"The insistence that the act grants special privileges and immunities is equally untenable. It is manifest that in every regulating statute the precise terms prescribed must be to some extent arbitrary, depending upon the exercise of a sound legislative judgment. The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced, and the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves

within its terms. This act neither confers special privileges nor makes unjust discriminations, but its privileges are open to every citizen upon the same terms. It denies no privilege to any one, and operates alike upon all who may avail themselves of its benefits. * * *

"The circumstance, that for a time it may inflict hardship, inconvenience and possibly loss to certain individuals, does not amount to a constitutional objection, so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed. This statute grants equal privileges and imposes like restrictions upon all persons under the same circumstances, and does not deprive appellee of due process of law, or deny him equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States."

Again, at page 227:

"The charters of national banks, state banks of discount and deposit, savings banks, and loan and deposit companies, authorize them to hold permanently only such real estate as may be necessary for the immediate and convenient accommodation of their business. It is not required that this limitation be altogether wise and just to warrant a holding that it is valid, but it is sufficient if it appears that it was designed and is reasonably calculated to subserve some public purpose. Private banks may be fairly expected to accommodate the public by making loans and discounts, and to that end should have some capital in money, in addition to that entrusted to their care by depositors. It

would be manifestly unwise to authorize an investment of the entire capital of a bank in real estate and furniture, and fixtures, as inimical to public accommodation; and it is a matter of current history that depositors have been made the victims of imposition and fraud through the allurements of pretended bankers whose only capital consisted of gilt signs, plate glass, mahogany furniture and richly embellished safes. We are not judicially advised that the provision limiting the investment of banking capital in the species of tangible property named would unjustly or unreasonably invade individual rights, but, on the contrary, it appears to us that this provision was suitably designed for the public good, and is a prudent regulation for the guidance of solvent bankers, and a proper precaution against fraud and imposition on the part of financial charlatans. It is our conclusion, therefore, that section two of the act does not contravene any of the constitutional guaranties invoked by appellee.

"The same constitutional objections are urged against the validity of that provision of section three of the act, which requires the banker to make oath, 'that the responsibility and net worth of the individual members of such firm, partnership or individual is equal to an amount at least double the amount of capital paid in such bank.' It is insisted that this clause prohibits a banker from using all of his capital in his business and is an instance of arbitrary selection and of illegal discrimination. It is not correct to say that the banker is thereby prohibited from using all his capital in his business, but he is forbidden from treating the entire holdings as capital stock, and in effect required to have and maintain a reserve or surplus fund. In considering this provision it must be borne in mind that the banking business is not wholly private, but *quasi*-public in character, and subject to governmental supervision, and in view of this fact the arguments advanced appear more appropriate for legislative than for judicial consideration. This feature of the statute is not dif-

ferent in principle from the double liability of stockholders in incorporated banks, and for the reason already given and upon the authorities cited we are of opinion that it does not violate any of the constitutional principles relied upon by appellee.

"It is finally contended that the provision requiring that an individual, or one member of a firm, conducting a banking business under this act must be a resident of Indiana, is invalid. We cannot sustain this objection. * * *

"The propriety of this provision is readily manifest. A private banker inviting the confidence and patronage of the public should not only possess suitable capital, but also a good character. The people entrusting their money to his care should be afforded an opportunity of learning something of his character, habits, and mode of life without going beyond state lines for information. A good character will not insure the safety of a business entrusted wholly to employes, but personal supervision is highly requisite. The situs of the bank assets for the purpose of taxation should be definitely fixed, and not left open to dispute by the nonresidence of the owner. It is important that the banker should be within the jurisdiction of our courts, civil and criminal, and be answerable personally to the complaints of creditors, and easily apprehended in case of a violation of the laws governing his business."

* * *

An act of the legislature of Minnesota prohibited the sale of cream that contained less than 20 per centum of fat. In *State v. Crescent Creamery Co.*, 83 Minn., 284, the defendant was convicted under this statute of the offense of selling cream containing less than 20 per centum of fat. It was contended that the statute was unconstitutional because unreasonable and not a proper exercise of the police power; that it was based upon an arbitrary classification, was special legislation, was an

unlawful restraint of trade, and illegally restricted the citizen's right to contract and pursue a lawful calling and deprived him of his liberty and property without due process of law. It was held, that the act was a valid exercise of the police power, and constitutional.

If one may constitutionally be deprived of selling cream which does not contain 20 per cent of fat in the exercise of police power of the state, why may the state not require that a person desiring to engage in the banking business shall do so under the form of a corporation? The deprivation of the right of a private individual as such to engage in the banking business is no more depriving him of the right to pursue a lawful vocation than is the deprivation of the right to sell cream containing less than the required per centum of fat.

It was said by this court in *McPherson v. Blacker*, 146 U. S. 1:

> "The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people. *In re Kemmler*, 136 U. S. 436.
>
> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation. *Pembina Company v. Pennsylvania*, 125 U. S. 181, 188.
>
> "In *Hayes v. Missouri*, 120 U. S. 68, 71, Mr. Justice Field, speaking for the court, said: 'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike,

> under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. 113 U. S. 237.'"

The legislature of Massachusetts enacted a law compelling all inhabitants over 21 years of age to submit, under certain circumstances, to vaccination under penalty for refusal. In the case of *Jacobson v. Massachusetts*, 197 U. S. 11, Jacobson was convicted in the State court of a refusal to be vaccinated. The conviction was sustained by the highest court of the State and that judgment was affirmed by the Supreme Court of the United States. As touching upon the questions of liberty, fundamental, inherent and natural rights of the individual, I here quote from the opinion in that case, p. 26:

> "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds

of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' *Railroad Co. v. Husen*, 95 U. S. 465, 471; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 628, 629; *Thorpe v. Rutland & Burlington R. R.*, 27 Vermont, 140, 148. In *Crowley v. Christensen*, 137 U. S. 86, 89, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.'"

Again, it is said at p. 29:

"The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will,' *Allgeyer v. Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger."

In *Phillips v. State*, 77 Ohio St., 214, a statute of Ohio required junk dealers and dealers in second-hand

articles, to retain such articles for 30 days before disposing of the same. Phillips was charged with having failed to retain certain quantities of old metal for 30 days after the metal was received, and was convicted. He prosecuted proceedings in error to the Supreme Court with a view of obtaining a reversal of the judgment of conviction. The opinion of the court in the case is as follows:

> "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals and best interests of the commonwealth may be done under the police power; and this implies that private rights exist subject to the public welfare. These principles are plainly recognized in article XIV, section 1, of the Constitution of the United States, and article 1, section 19, of the Constitution of Ohio. The federal constitution provides: 'That no state shall deprive any person of life, liberty or property without due process of law.' Of course, the converse is understood, that any state may deprive a person of life, liberty or property in the due process of law. That which is due process of law is so well defined in numerous decisions, both state and federal, that we need not discuss it here. The constitution of this state provides that 'private property shall be held inviolate, but subservient to the public welfare.'
>
> "Therefore, the general power of the legislature to determine what is necessary for the protection of the public interests being clear, judicial inquiry is necessarily limited to determining whether a particular regulation is reasonable, impartial and within the limitations of the constitution. The legislature is the judge of the mischief and the remedy, and of what shall be state policy, subject to the restrictions just mentioned.
>
> "The business of dealing in second-hand articles and junk is one which is peculiarly liable to abuse; and, whether honestly conducted or not, experience has shown that stolen or lost property frequently finds its way to the junk dealer, through the

> agency of the persons who have unlawfully appropriated it. In view of the fact that it frequently happens that individuals seeking to reclaim their property are suddenly stopped and forever baffled at the door of the junk dealer's shop, the requirements complained of here seem to us to be very fair and moderate."

In 1870 the legislature of Pennsylvania passed an act which made it unlawful for any person, partnership, or association to issue any fire insurance policy without authority to do so expressly conferred by a charter of incorporation given according to law, and declared void all policies issued without such authority. It was also made a misdemeanor to issue the prohibited policies. The validity of the statute was called in question in *Commonwealth v. Vrooman*, 164 Pa. St., 306 (25 L. R. A. 250). The opinion covers the entire question of the power of the state to enact such legislation. At page 253, 25 L. R. A., it is said:

> "The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improved methods of business."

The court then considers the magnitude of the fire insurance business, and says:

> "Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are: *a*. The existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; *b*, the strong probability that loss from this danger

will fall upon but few of those who are exposed to it; *c*, the certainty that when the loss happens it will fall so heavily upon those to whom it comes as to make pecuniary indemnity a matter of great importance; *d*, some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses and secure a fair return for the capital employed. In view of the magnitude and the nature of the insurance business it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first, permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained and that is by means of general laws regulating the insurance business. Corporations derive their existence from the State, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the methods, the economy, and financial strength of the management, and the value of the security provided for the holders of policies in any given company, are therefore subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitorial power. They cannot ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments.

They cannot be restricted in the use of either their capital or their profits as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

"In the next place it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance companies has been assumed by the states, and exercised through the insurance department. In our state this system of legislation began as early as 1810 and it has grown in bulk and importance with the growth of business and the development of the resources of the State. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at one hundred thousand dollars. It provides for a reserve fund for the security of policy holders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other States or countries to make certain deposits in this state to secure those who are insured by them, and to appoint some suitable agent on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As mat-

ter of fact the business has for many years been left to the corporations and regulations made to affect corporations have therefore met fully the public need. At this time, however, private capital is seeking employment in this field and it signalizes its entry upon the field by a denial of the power of the state over it." * * *

"It would seem to follow logically that the state might require all persons desiring to enter upon the business to comply with the same conditions and, if necessary, to obtain a charter of incorporation in order to such compliance. An effort is made to distinguish between regulation and prohibition and to hold that the act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the act prescribes. The act implies a declaration by the legislature that the business of insurance against fire affects so many persons, and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such as private persons cannot be compelled to submit their business conduct to, and then expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose because corporations are subject to the supervision and control of the state that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control and it necessarily prohibits the business outside that channel." * * *

"The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs, and many similar laws afford instances of the exercise of the police power for the complete suppression of a given line of employment, or for its restriction and control.

"The act of 1870 belongs to the latter class. It does not prohibit the business of insurance but regulates it. It says to all persons interested: 'If you wish to embark in this business you must secure a charter of incorporation so as to subject your business to the visitorial power of the State. If you will not do this you must not engage in insurance against fire at all.' This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under state supervision and control, by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the State will reach them, and the insurance department of the State can supervise their business, and compel observance of the law.

"Without going further into the discussion we may now state our conclusions applicable to the case before us.

"1. The business of insurance against loss by fire is by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the State.

"2. The act of 1870 is a valid exercise of the police power. It does not prohibit but regulates the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike, to entitle them to enter the business.

"3. The qualification is reasonable. It is open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and State supervision during the continuance of the business."

This case was cited by the Supreme Court of Pennsylvania in 116 Pa. St., 78.

It was held in *Nance v. Hemphill*, 1 Ala., 551, 557, that private banking was a common law right, but whether that right should be denied to individuals was a question for the legislature to determine.

In *James Myers et al. v. Manhattan Bank*, 20 Ohio, 283, the Manhattan Bank sued Myers and another on a note executed by Myers' partner in the firm name of Myers & Company to Comstock or order payable at the Manhattan Bank 60 days after date for one hundred dollars, which note was endorsed by Comstock and at its date discounted by the bank. The bank was not incorporated or authorized to transact business in the State of Ohio. It was held that the bank was not entitled to recover. By the law of Ohio private individuals were not allowed to transact the banking business. At page 302 of the report it is said:

> "Now it will not be douted that it was competent for the legislature to have allowed all persons to bank, or to have prohibited all; or, to do as they have done, allow all 'incorporated by a law of this state' and prohibit all others. The policy of this legislation is perfectly obvious. They intended to guard the community against fraud and imposition by exacting of persons engaged in this business the proper security before they were suffered to enter upon it, and to make them directly amenable for abuses to our own laws."

I leave this branch of the discussion in confident reliance upon these propositions:

FIRST. That no case decided by this court, and no principle of law enunciated by it, sustains the contention that the Nebraska statute of 1909 deprives the plaintiffs, or any of them, of rights guaranteed under the constitution of the United States.

SECOND. That the State may, in the legitimate exercise of its legislative or police power, prohibit individuals, not incorporated, from engaging in the banking business, within its jurisdiction, and that it infringes no legal right by so doing.

THIRD. That as the legislative act in question operates upon all individuals alike, and does not prohibit them from engaging in the banking business, but merely prescribes the terms and conditions upon which they may engage in that business, it is valid.

FOURTH. That the right of the State to enact such legislation is sustained, not only by this court, but by the clear and undoubted weight of authority by the courts of last resort of the States, the one case from South Dakota being the only one to the contrary.

II.

The second question is this:

Is the guaranty feature of the law in conflict with the Constitution of the State of Nebraska?

Section 45 of the act of 1909 reads thus:

"Within thirty days after the taking effect of this act, and on the first day of December, 1909, and on the first day of June and December of each year thereafter, every corporation engaged in banking under the provisions of this act, shall make and file with the State Banking Board a statement in writing verified by the oath of its president, vice-president or cashier, showing the average daily deposits in its bank for the preceeding six months, exclusive of public money otherwise secured. And on the first day of the month next succeeding the date fixed for the making and filing of such statement, the State Banking Board shall levy assessments against the capital stock of each of said banking corporations as follows: Within sixty days after the taking effecct of this act, one-fourth of one per cent of the average daily deposits, as shown by the first statement of such average daily deposits required to be made and filed by the provisions of this section; on the first day of January, 1910, one-fourth of one

per cent of the average daily deposits, as shown by the statement required to be made and filed on the first day of December, 1909; on the first day of July, 1910, and one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of June, 1910; and on the first day of January, 1911, one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of December, 1910; and on the first day of July and January of each year thereafter, one-twentieth of one per cent of the average daily deposits, as shown by the statement thereof required to be made and filed next preceding such assessment. Provided, however, that any bank commencing business and receiving deposits less than six months prior to the date when the statement referred to in this section is required to be made and filed, shall show the average daily deposits for that portion of the said semi-annual period during which it has been engaged in business and receiving deposits."

The penal portion of the section I have omitted. There are other sections of the act which relate to the guaranty feature, but the portion of section 45 above set out is the part of the law which incites and induces the pending attack.

So much apparent reliance was by counsel for the banks placed upon the Bill of Rights, which is a part of the Constitution of Nebraska, that I here set out portions of the first section of the Bill of Rights of the Constitution of Nebraska of 1866, the first adopted by the State, and a part of the Constitution of 1875, now in force.

CONSTITUTION OF 1866.

To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

CONSTITUTION OF 1875.

To secure these rights, and the protection of property, governments are instituted among the people, deriving their just powers from the consent of the governed.

The words to which I direct the attention of the court, which were not in the Constitution of 1866, but which are in the Constitution of 1875, are these:

"And the protection of property."

It is a rule of construction, applicable alike to constitutions and statutes, that effect is to be given, if possible, to the whole instrument, and every section and clause. This, I take it, will not be controverted. When the legislature enacts an amendatory or new statute, or the people adopt an amendatory or new constitution, either of which contains new provisions, the presumption is that the former statute or constitution, as the case may be, was deemed defective or incomplete as to the matter regarding which the amendments are made; that the purpose in the enactment or adoption of the new provisions was to supply the omissions or correct the defects.

It will probably not be contended by counsel for the banks that the constitutional convention of 1875 meant nothing, intended nothing, when it added to the draft of the constitution that year submitted to the people, the words above quoted which were omitted from the constitution of 1866. In view of the reliance which counsel for the banks place upon other portions of the Bill of Rights, they ought to be estopped to say that the constitutional convention of 1875 was dealing in "glittering generalities" only, when it added the words quoted.

The Constitution of 1866 provided that

> "The property of no person shall be taken for public use without just compensation therefor."

The Constitution of 1875 provides that

> "The property of no person shall be taken, or damaged, for public use without just compensation therefor."

It was held in the case of *O. & R. V. R. R. Co. v. Standen*, 22 Neb., 343, that the insertion of the words "or damaged" in the Constitution of 1875 was intended to give a right of recovery which did not previously exist. The insertion of the words "and the protection of property" in the Constitution of 1875 evinces a purpose to employ the powers of government to protect property, as much as to secure the "inherent rights of all persons." The measure, method and extent of protection were not prescribed or limited by the constitution but are matters left to the determination of the legislative department, subject to the review of the judicial department, *within its proper and legal jurisdiction.*

From time to time the legislature has by statute extended protection over other property. It has enacted laws for the protection of game; for the destruction of weeds in the highway, the destruction to be accomplished by the adjoining landowner and at his expense. It has enacted laws relative to food, to protect that which is genuine against the competition of that which is spurious.

* * *

It was not until 1877 that the legislature enacted a law relating to banking in Nebraska, except the law enacted by the Territorial legislature of 1855, the first convened in Nebraska, which prohibited the issuance of paper intended to circulate as money, and which, with a few amendments, is still in force as section 142 of the criminal code of the State. By the act of 1877 banks were only required to make annual reports to the Auditor of their condition, resources and liabilities. Laws of 1877, 204; Comp. Stat. 1877, ch. 8, secs. 1, 2, 3.

In 1889 a new and much more elaborate banking law was enacted making it unlawful for any corporation, firm or individual to transact a banking business by receiving money on deposit, buying and selling exchange and the

like, unless such corporation, firm or individual should have property of the cash value ranging from $5,000 in communities having a population of one thousand or less, to $50,000 in cities having more than ten thousand inhabitants. This law provided that the property should be in money, commercial paper, bank furniture and building, with the lot or lots on which the buildings were constructed, of the cash value fixed by the act, above all incumbrances and liabilities owing by the corporation, firm or individual, *provided*, that the real estate, furniture and fixtures should not constitute more than one-third of the capital.

This act required the banks to make to the Auditor not less than three reports each year, according to forms to be prescribed by that official, which should state the amount loaned upon bonds and mortgages, the actual market value of all stock or bond investments, the amount loaned on notes, bills of exchange, over-drafts and personal securities, the amount of rediscounts and commercial paper past due, the amount of real estate owned, cash on hand and on deposit, and the amount of all other assets. Banks were required to submit to examinations, the fee to be not less than $10, nor more than $20, for each examination, and not more than one examination each year. The amounts received by the examiner in excess of $2,000 per annum and traveling expenses to be paid into the state treasury. The act also provided that every bank have on hand at all times as a reserve, in available funds, an amount equal at least to 15 per cent of its deposits and immediate liabilities, save in cities having a population of 25,000 or more, where the reserve was to be 20 per cent. No part of the reserve was required to be kept in cash in the vaults. Laws 1889, ch. 37; Comp. Stat. 1889, ch. 8.

A new banking act was passed in 1895, which created a Banking Board comprised of the same executive officers

of the State who are here defendants. The board was authorized to appoint a secretary and clerk. The number of annual reports required was increased to four; the amount of capital remained the same. The fees for examination were fixed according to the capital of the bank; the excess above $2,000 and traveling expenses to be paid into the state treasury, as under the provisions of the act in question. The reserve remained the same, *but two-fifths of the reserve was required to be kept in cash in the vaults of the bank.* It prohibited any bank loaning to any single corporation, firm or individual more than twenty per cent of the paid-up capital and prohibited the withdrawal of any of its capital for any purpose. Laws 1895, ch. 8; Comp. Stats. 1895, ch. 8.

This law remained in force with a few amendments not necessary to be here noticed until 1909, when it was repealed by the law under consideration.

* * *

It will be noticed that since the enactment of the law of 1889 it has been unlawful for any person, firm or corporation to engage in the banking business who did not possess the requisite capital. If the right to engage in that business is one of inalienable rights guaranteed by the state constitution, then such provision of the statute was violative of that right, for the constitution makes no exception, based upon the amount of capital possessed.

It was said by the Supreme Court of Ohio, in the case of *State ex rel. v. Ackerman et al.*, 51 Ohio St., 194.

> "The author of a recent and well prepared work, treating of this subject, says: 'Where, by statute, the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but had become a mat-

ter of public concern, that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function. In this case, the legislature has done no more than was done by the court in the other instance, when it, from considerations of a public nature, declared, as a principle of common law, that facts brought to its notice, or of which it then took judicial notice, warranted the application of principles existing independently of the legislative declaration to the effect that the right claimed was matter of public and not exclusively of private concern. * * *

"There was no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost, if not quite all the states, stringent requirements as to security of the persons dealing with insurers and the making and filing reports with public officers for public information, are provided, and must be strictly observed and complied with before any person, association or corporation may make any contract of life insurance. *The effect of such statute is to make that a franchise which previously had been a matter purely of private right.*" (Italics mine.)

* * *

But it is said that the act deprives the bank of its property and that without due process of law. By way of illustration let it be supposed that one of the banks had at the date of its last report deposits to the amount of $350,000, and the fourth one named in the bill had practically that amount; it would be required to keep in cash in its vaults two-fifths of its reserve, which would be $21,000. This sum loaned at the legal rate of interest of the state would bring the bank $1,470 per annum. But the bank cannot loan the money and is deprived of $1,470 each year.

At the date of the last report of the State Banking Board the deposits in banks subject to State supervision, excluding savings banks, amounted to more than $60,258,000; two-fifths of 15 per cent of this amount, or $3,615,480, the banks must keep in their vaults. They can neither loan, use, or invest it and they must lose the interest thereon which at the legal rate amounts to more than $242,000 per annum. Why is this reserve required? It is for the security of the depositors, the creditors of the bank. That the State has the power to require the keeping of this reserve, or to increase it, will not, I take it, be denied, the power to regulate being admitted. Wherein, in principle, does this taking differ from requiring the banks to keep a certain per cent of their deposits for the security of depositors?

The banking business is a *quasi*-public business; not because the statute so declares, *but because it is such.* The State regulated and controlled it, even to the extent of excluding those who did not possess $5,000 therefrom, before the legislature by law declared it to be that kind of business. The State has an interest in the banking business as it has in the insurance business. It is interested in seeing that those who deposit their money in banks which are a necessity, under existing conditions, shall be reasonably certain of getting their money after they have loaned it to or deposited it in banks. The power of the legislature to regulate the rate of interest admittedly exists. None deny the right to enact exemption and homestead laws. The State is as much interested in providing laws which shall protect depositors as it is in seeing that the creditor shall not take all that the debtor, who is the head of a family, has. The State has an interest in seeing that banks do not fail. Banks which are safe tend to inculcate habits of thrift, frugality and economy, all of which are in the interest of good government.

It is said that the effect of this law is to take the money of one bank to pay the debts of another bank. Let it be supposed that there are in one county of the state five individuals who are incapacitated by reason of age from earning a living and are dependent upon the public for support. Originally each possessed $5,000. Let it be further supposed that in the same county were five banks in one of which these individuals deposited the $5,000 possessed by each. The bank holding the deposits of these individuals failed and the entire deposits were lost, and as a consequence these depositors became public charges. Could any of the other four banks in the county which did not fail, successfully resist the levy or collection of the poor fund tax the purpose of which was to support these five individuals? I think not. And yet this would be taking the property of the solvent banks to pay the result of the loss of the insolvent one.

Again, it was said by counsel for the banks, "*The debt from the bank to the depositor is a private debt. The claim of the depositor is a private claim.*" So is the claim which the widow of a deceased husband holds against an insurance company which wrote a policy on his life, payable on demand after his death. The law provides protection for that claim by requiring the insurance company to carry a reserve for the payment of the claim, and provides the manner in which that reserve shall be invested. One is no more a private claim than the other. The Supreme Court of Illinois, in the case of *North American Insurance Co. v. Yates*, 214 Ill., 275, use this language, which is equally applicable to the banking business:

> "The business of insurance is the outgrowth of time and the demands and necessities of the public. It extends into and covers almost every branch of business and all the relations of life, and is applied to all the hazards of business in life where a basis of risk and compensation can be estimated. In all the stages of life, from the cradle to the

grave, it asserts an interest and offers succor and aid. In the business enterprises, whether by land or sea; in the possessions of men, from a pane of glass to the mansion or factory; in his undertakings involving every chance, misfortune, moral turpitude or the act of God, it demands admission and promises indemnity, reward or gain. It poses as the faithful and zealous trustee of his earnings and savings, and promises to the widow and orphan a guaranty against misery and want. It intercedes between principal and agent, master and servant, contractor and owner, and insures against loss from almost any and every cause. It is a public necessity that deals in its own credit for a cash consideration from the assured, and is stamped with public interest, and must yield obedience to necessary and proper regulations by the State in the exercise of its police power. (Freund on Police Power, secs. 373, 399, 400, 401, 494; *Commonwealth v. Vrooman*, 164 Pa., 321; *John Hancock Mutual Life Ass. v. Warren*, 181 U. S. 73; *Fidelity Mutual Life Ass. v. Metler*, 185 id. 327.) 'Banking and insurance being peculiarly affected with the public interest, it follows that the right to carry on their business may be made to depend upon the compliance with certain conditions.' (Freund on Police Power, sec. 401.)

"The business is usually conducted by corporations that are creatures of the law, and their rights and immunities are to be found in the law. They have no natural rights. * * * 'A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporation act has made them, and can only be exercised in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purpose and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.'"

The banking business is to a much greater extent uni-

versal than is the business of life insurance and the above quotation is equally applicable to the banking business. Freund in his work on Police Power, section 401, says:

> "The banking and insurance business being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be reuired as evqidence of compliance. In New York, in the case of savings banks and trust companies, the authorization is given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public advantage will be promoted by such establishment."

It was held in *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S., 262, that an order directing a railroad company to operate a train over its line was not, even if such train was operated at a loss, a deprivation of property without due process of law, or the taking of private property without due process of law.

In the case of *Fid. Mut. Life Assn. v. Mettler* (185 U. S., 308), there was involved the validity of a statute of the State of Texas, which provided that life and health insurance companies in default in payment of their policies should pay twelve per cent damages together with reasonable attorney's fees. It was contended that this statute was in violation of the Constitution of the United States, but the contention was not upheld. At page 327 of the opinion it was said, quoting from the opinion in *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28:

> "A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which the act authorizes. In other words, the State prescribes the purposes

of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations.' And we added: It was for the legislature of Ohio to define the public policy of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

Below counsel for the banks cited the case of *G. C. & S. F. Ry. Co. v. Ellis*, 165 U. S., 150, in which it was held that a statute of the State of Texas, which provided that a person having a claim against any railway company for overcharges on freight or claims for stock killed by a train, should, in case the claim was not paid within a designated time, and a recovery was had, be entitled to recover an attorney's fee, was void. But they failed to discover the much more recent case of *Farmers, etc., Ins. Co. v. Dobney*, 189 U. S., 301, in which it was held that a statute of Nebraska which provided that an attorney's fee might be recovered from an insurance company in case of a total loss, was not in conflict with the Fourteenth Amendment, and that the statute was valid.

The case last above cited was cited by Justice Brewer in the opinion of the court in *Seaboard Air Line v. Seegers*, 207 U. S., 73, 77, in which was involved the constitutionality of a statute of South Carolina which provided a penalty of $50, to be assessed against any common carrier which failed within a certain time to adjust and pay a claim for damage to property sustained while the property was in the possession of the carrier. The statute was

held to be valid. These cases effectually dispose of the case of *G. C. & S. F. Ry. Co.* cited by counsel for the banks.

* * *

Banks invite deposits of money, and when secured the deposits are invested by the banks for their profit. What interest, if any, they shall pay on the deposits is a matter of contract between the banks and the depositors, but it is such a rate as will enable the banks to invest the money at a profit after paying the agreed interest. If the law in question provided that there should be levied a tax upon all the taxable property of a county or district in which a bank is located, for the payment of depositors of banks which failed, the case would then come nearer being an example of taking the property of one to pay the debt of another. Under this statute the bank is required to set aside a percentage of its deposits for a specific purpose. The theory of the law is that the banks make enough out of the deposits, by investment, to warrant the State in requiring them to set aside the percentage for the security, not of all the creditors of the bank, but those who place their money there. If the assessment is too burdensome to be borne, the banks have their remedy. If, however, the State has the right to regulate the banking business; if it may require the keeping of a reserve; if it may prohibit the payment of dividends from capital; if it may provide that loans shall not be made on certain classes of property; if it may provide that its funds shall not be loaned to the officers of the bank, and not more than a certain per cent of its capital to one individual or concern, then this is a valid law and in no way conflicts with the constitution of the State.

* * *

There is here no levying of taxes upon private institutions for private purposes. There is no levying of taxes

under any correct construction of the law. What the statute provides is that each bank must lay aside a certain per cent of its deposits to secure its depositors, just as it says that the banks must lay aside a certain other per cent, and keep the same in actual cash in its vaults, in order to meet the demands of the depositors when they call for their money, which is payable on demand.

There is no difference, in principle, between the law which requires the banks to keep a reserve fund and one which requires them to keep a guaranty fund.

III.

May the State restrict the banking business within its jurisdiction to corporations?

If the legislature has the power, as it undoubtedly has, to prevent private individuals from engaging in the banking business, having in view the welfare of the people of the State, then it may determine who shall conduct that business, and that it shall be conducted by corporations alone. There is nothing in the constitution of the State or of the United States which prohibits it. The government of the United States, within its constitutional limits, is supreme; within its constitutional limits the State is supreme. Necessarily this must be so or the states do not possess the power of sovereignty. The Tenth Amendment declares,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The State governments are governments of reserved powers, while the Federal government is one of delegated

or enumerated powers. The power to regulate the business of banking within the States has not been delegated to the United States; it is not within the enumerated or incidental powers of the Federal government. It is not by the Constitution "prohibited to the States." It is "reserved to the States respectively, or to the people." As was said by Chief Justice Marshall in the Dartmouth College Case,

> "The framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government."

Banking is one of the civil institutions and the statute in question is one adopted for the internal government of State affairs as much as the statute regulating the rate of interest.

IV.

Does the act in question impair the obligations of contracts?

Section 16, article 1 of the Constitution of the State of Nebraska, provides:

> "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The same instrument prohibits the creation of corporations by special law, and contains this language,

> "The legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed."

These constitutional provisions prohibit the making of any irrevocable grant, and provide for the amendment

or repeal of statutes under which corporations are created. The question of the constitutional rights of corporations organized under general laws have been before the Supreme Court of Nebraska. In *C., B. & Q. Ry. Co. v. State ex rel.*, 47 Neb., 549, the railway company contended that an ordinance of the city of Omaha which required it to construct a viaduct impaired the obligation of a contract. The court declined to uphold the contention of the company. In the opinion, page 564 it was said:

> "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the State, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument."

Again at page 574 it is said:

> "Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise."

It cannot be assumed that the word "safety," used in the opinion, means safety to the person alone. It means safety to property as well as to person.

Upon being defeated in the Supreme Court of the State the company sued out a writ of error bringing the case to this court, alleging in its assignments of errors that the statute of Nebraska, which was by the State court held to be valid, was repugnant to the Constitution of the United States because it impaired the obligation of con-

tracts, abridged the company's privileges and immunities, deprived it of its property without due process of law, and denied to it the equal protection of the laws. It will be seen that the case presented every vital question, so far as contract rights are concerned, now before the court in the present case. The case is reported in 170 U. S. 57. Every contention of the plaintiff in error was denied and the statute held to be valid by the unanimous decision of all the members of the court participating in the hearing and determination. The court in the opening of the opinion stated that it proceeded to determine for itself the existence of the contract set up, and whether its obligation had been impaired by the state enactment. At the conclusion of the opinion the court say:

> "The validity of the statute and the ordinance having been passed upon and upheld by the courts of the State, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances."

* * *

The Constitution of Nebraska provides that no general law shall be enacted granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof. Section 2, article 11. At an election duly held in the city of Lincoln, the consent of the electors of the city was given to the Lincoln Street Railway Company to construct and operate street railway lines over and along the streets of the city. The ordinance submitting the matter to a vote contained this provision:

> "Said railway track shall be so constructed and maintained as to present the least practical obstruction to the ordinary and public use of the streets, and

that it shall, when required, conform to the established grade of the streets as now or hereafter to be established when such streets are brought to grade. And further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance."

Subsequently the legislature enacted a law which provided that,

"All street railway companies now existing or hereafter created, in any city governed by this act or that shall hereafter be organized thereunder, shall be required to pave or repave between and to one foot beyond their outer rails, or in case said railway use more than one track in any street, they shall pave between and to one foot beyond their outer rails where such company owns at their own cost."

Under this act the railway was required to pave, but declining to do so the streets were paved and action brought to recover the expense of paving. In the trial court judgment was rendered against the company for upwards of $100,000 and the company prosecuted proceedings in error to reverse the judgment. The case is reported in 61 Neb., 109. The court states one of the questions presented for determination thus, page 125:

"Counsel for defendants insist that the ordinance establishes a contract with respect to its franchise, defines its terms and grants property rights, which are infringed upon by the statutes afterwards enacted requiring the company to pave the part of the streets occupied by its tracks."

At page 126, it is said:

"While it is essential that the consent of a majority of the electors be secured before any charter or franchise rights can accrue to a street railway company, the provisions of the constitution and the statutes requiring such consent cannot be made the basis

of a contract respecting corporate rights and privileges between the city and such company. The charter rights are derived from the general law. The consent of a majority of the electors can only be regarded as a condition precedent, on the happening of which is dependent the right to construct and maintain on the streets a railway, and does not enlarge or restrict the grant arising by virtue of the general laws, or in other respects affect the legislature in the exercise of its lawful authority. The property rights of the defendant company, its right of an easement in the streets for the purposes of its creation, and its corporate franchise derived under the law, are all recognized and respected. If contention of counsel be correct, and the ordinance and its acceptance constitutes a contract between the city and defendant with respect to its franchise, then it is in the power of the authorities of the different towns and cities to enter into contract relations with respect to such franchise, which in effect creates special charters, nullifies the constitutional provisions referred to, and renders impotent the legislature as to all future legislation in regard to such matters. This clearly is not the law. If it were sought to deprive the defendant of any of its 'vested rights,' many of the authorities cited would be applicable and carry great weight. Defendant assumes that the city has granted it a charter, and that in that charter it is exempted from any assessment, either as special benefits, or as a reasonable regulation and an exercise of the reserve power of the legislature. We think it in error in both respects. The provisions relied on do not, in our judgment, warrant the inference that the burdens sought to be imposed were exempted; nor do the corporate rights and privileges of the defendant have their origin in the ordinance under which the consent of the electors was obtained, but in the general laws of the state. The ordinance, so far as the provisions relied on are concerned, should, it seems to us, be regarded as one of regulation authorized by statute, and not of contract creating vested rights. Says the eminent author of Consti-

tutional Law, Judge Cooley, in *Detroit v. Howell Plank Road Co.*, 43 Mich., 140, 145: 'Legislators cannot thus bind the hands of their successors where the elements of contract, concession and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuses that courts will not be astute in discovering the existence of a contract between the state and those who claim franchises under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the state in such cases, and 'to be in doubt is to be resolved.' "

Again, at page 131:

"We now reach what we conceive to be the most cogent reason for upholding the validity of the sections of the statute assailed by the defendants. We are convinced that the power therein exercised is one reserved to the legislature by the constitution, and of which it is incapable of divesting itself; and for stronger reasons, it could not authorize a city council to act in such a manner as to deprive it of such power. The right being reserved to the legislature by the constitution, it is empowered to alter, amend or repeal the laws respecting street railways in such manner as is approved by its wisdom and judgment; and its right extends, not alone to laws providing for the incorporation and organization of such companies, but also to those which seek to control, regulate and otherwise affect such corporations in the enjoyment of their franchises.

"Says Judge Field, of the United States Supreme Court, with reference to a reservation in a statute that the charter of every corporation should be subject to amendment, alteration or repeal by legislative authority: 'The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State.' *Tomlinson v. Jessup*, 15 Wall. (U. S.), 454, 459. Of like import is *Railroad*

Co. v. Maine, 96 U. S., 499, in which the opinion was written by the same eminent jurist. In speaking on the same subject Judge Cooley, in *Detroit v. Detroit & Howell Plank Road Co.*, 43 Mich., 140, 147, says: 'But for the provision in the constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired.'"

Again, at page 133:

"No property or vested rights are endangered or lost to the defendant by the sections of the statute objected to. The power invoked is a regulation to which all, in some form or other, are subjected in bearing the burdens incident to the growth and development of the municipality. As before intimated, the requirements are only reasonable and appropriately attach and belong to a street railway company in the conduct of its business over the paved streets of the city. For both the validity and reasonableness of the exercise of the legislative power objected to we have precedent well supported by authority.

Again, on page 135:

"We therefore conclude the sections objected to were enacted by the legislature in the exercise of a valid power belonging to it; that no rights or privileges possessed by the defendant company or those con-

solidated with it were invaded or impaired by such legislation; and that the legislature had the right to impose the liability by said sections created, notwithstanding the ordinance under which defendant claims exemption from such liability. We do not think the law in this respect contravenes any provision of either the federal or state constitution."

* * *

The State of New York established a general banking law in 1832, one section of which provided that, "No shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, unless the articles of association signed by him shall have declared that the shareholder shall be liable."

Another section of the act provided that any number of persons might associate to establish offices of discount, deposit and circulation upon the terms and conditions prescribed in the act.

Another section of the act provided that "the legislature may, at any time, alter or repeal this act."

Afterwards an amendment to the State Constitution and an act of the legislature declared that the shareholders of all banks which should continue to issue notes after a certain time must be individually responsible.

In the case of *Sherman v. Smith*, 1 Black, 587, in which this statute of New York was assailed, it was held by this court that the stockholders of a bank organized under the general banking law, before the amendment of the Constitution, were liable for the debts of the association in their individual capacity.

That the articles of association made by the stockholders at the time they organized themselves as a bank were not a contract with the State.

That the change made by the Constitution and subsequent act of the legislature were not the less constitu-

tional and valid as against this bank because the stockholders in the articles of association had declared that they would not be individually bound for the debts of the concern.

The statute of Nebraska does not deprive the incorporated banks of their franchises or right to transact the banking business; it simply prescribes the terms upon which they shall exercise the right. It no more impairs the right to transact business than does the law which requires banks to keep and maintain a reserve. They necessarily sustain some loss, both in keeping the reserve and the guaranty fund; but this is an incident of the business and it deprives them of no contract rights nor does it impair the obligation of any contract. It is not contended that any of the plaintiffs were incorporated prior to the adoption of the Constitution of 1875; each accepted its franchise, charter, or whatever it may be termed, with full knowledge of the constitutional provision. In effect each agreed that the legislature might alter, amend or repeal the statute under which it was incorporated. Nothing more has been done by the legislature than the incorporated banks said might be done. If the legislature cannot amend the banking act as has been done by the act of 1909, it must be because the State has authorized the creation of corporations which it cannot control; because the creature is greater than the creator.

* * *

In *Commissioners v. Holyoke Water Power Co.*, 104 Mass., 446, it was held that a statute of Massachusetts declaring that acts of incorporation should be subject to amendment, alteration or repeal at the pleasure of the legislature, reserved to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which would not defeat or substantially impair the object of the grant, or any vested rights under

it which the legislature might deem necessary to secure either that object or other public or private rights. In that case the charter of the corporation did not expressly exempt it from maintaining a dam without a fish-way, and was subject to amendment, alteration or repeal at the pleasure of the legislature. The corporation paid the damages to owners of fish-rights above the dam and constructed a dam without a fish-way, thus destroying fishing rights above and impairing those below the dam. Afterwards the legislature enacted a law requiring the construction of a fish-way in the dam. From the decision of the state court sustaining the statute error proceedings were prosecuted to the Supreme Court of the United States where the decision of the State Court was affirmed. 15 Wall., 500.

Among many other cases which might be cited sustaining the power of the State to pass laws amending previous statutes under which corporations are created, may be cited the following:

Close v. Glenwood Co., 107 U. S., 466, 476.
Anderson v. Seymour, 70 Minn., 358.
Shields v. Ohio, 95 U. S., 319.
City of Roxbury v. B. & P. R. Corp., 6 Cush., 434.
Mass. Gen. Hospital v. State, etc., 4 Gray, 227.
Parker v. Metropolitan R. Co., 109 Mass., 506.
Story v. Jersey, etc., R. Co., 16 N. J. Eq., 14.
People ex rel. v. B. & A. R. R. Co., 70 N. Y., 569.
Montclair v. N. Y. & G. L. R. Co., 45 N. J. Eq., 443.
Pennsylvania College Case, 13 Wall., 190.
Greenwood v. Freight Co., 105 U. S., 13.
Citizens Savings Bank v. Owensboro, 173 U. S., 637.
N. Y. & N. E. R. R. Co. v. Bristow, 151 U. S. 536, 567.
Looker v Maynard, 179 U. S., 46, 52.
Bissel v. Heath, 57 N. W. Rep. (Ia.), 585.

Numerous other adjudicated cases might be cited to the same effect, where power to amend, alter or repeal statutes under which corporations are created is reserved. Unless the legislature has this power the constitutional provision hereinbefore quoted is meaningless.

* * *

It was said below:

> "There was a negotiation as it were and a meeting of minds of the parties, to-wit: The Banking Board representing the State, by which the *State* granted to the bank a charter to carry on the banking business which has the force and effect of a contract between the State and the bank."

It is remarkable if the legislature can authorize a State Banking Board to confer upon banking corporations an "irrevocable grant of special privileges or immunities" by a "meeting of minds" of the banks and the Banking Board, in view of the provisions of the Constitution hereinbefore quoted.

If there was a meeting of minds when the permit was issued, there was equally a meeting of minds when the plaintiffs incorporated, by which meeting of minds the State granted to the bank corporate rights, and the banks accepted them *with the agreement that the laws granting these rights might be altered from time to time, or repealed, which has the force and effect of a contract between the banks and the State.*

* * *

It was said below:

> *"The law is vicious in that it puts a premium upon incapacity.* It is an inducement to incompetent persons to enter the banking business with the credit of the State behind them as sponsor that they will pay their depositors. This credit of the State so put behind unsound banks may be used, and will be used, by them to *lure* the depositors

who would not otherwise trust their deposits with them. The state by this process becomes *particeps criminis* in illegitimate banking."

Again it was said:

"This arbitrary selection of insolvent banks, or of a few depositors in such insolvent banks as the beneficiaries of the State's protection, is reprehensible in the extreme."

Here is an admission that there are incompetent bankers, unsound and insolvent banks; but which banker is incompetent, which bank unsound or insolvent?

Each bank opposes a guaranty law because it places upon the "conservative banker" the liability of paying the depositors of the "reckless banker." As between themselves banks have a knowledge of the action of bankers which the general public does not possess; therefore the legislature has provided for the security of all deposits.

Again it was said:

"In the case at bar there is nothing in the record, nor existing in fact, to show that there is any exigency to the public generally demanding the Guaranty Fund. A large body of the people think they want it, but that does not suffice. There must exist a necessity. No such condition exists. When Wall Street was under the whirl of excitement a couple of years ago Nebraska did not suffer. Her banks did not go into the hands of receivers. Depositors did not lose any money. *There is no more danger in the State of Nebraska, of the public generally being injured by loss of money to depositors than there is of an invasion of Asiatic cholera or of bubonic plague. No one would say at this time that the money of one class of corporations should be taken to create a fund to guard against epidemics.*"

The admission in one part of the argument that there are incompetent bankers, unsound and insolvent banks, is

hardly consistent with the statement that there is no more danger of the public generally being injured by loss of money to depositors than there is of an invasion of cholera or bubonic plague. The State does not enact laws to protect only the strong—those who by reason of their strength may be able to protect themselves—but its duty is to protect all the people of the State, the rich as well as the poor, the weak as well as the strong. This, within its discretion and judgment, the legislature has done. The State is interested in the safety and solvency of every bank; in the security of every deposit and depositor.

It is true, "A large body of the people think they want it." The entire body of the people of the State, speaking through their representatives in the legislature, representatives elected upon that issue, declared that they wanted it. Out of upwards of six hundred and sixty banks under state supervision it seems that only fifty-four could be found who don't want it.

It is no answer to say that two years ago none of the banks in Nebraska went into the hands of receivers, in view of the fact that banks closed their cash drawers and refused to pay their depositors money. If the deposits had been secured, if the depositors had been assured that they would get their money, there would have been no unusual demand for money. WHAT THE DEPOSITORS WANT TO KNOW IS THAT THEIR DEPOSITS ARE SECURE; THAT THEY CAN GET THEIR MONEY WHEN THEY CALL FOR IT. This legislation is intended to afford them that assurance.

Is the State *particeps criminis* in illegitimate banking because it permits bankers under the law, section 14, to print or engrave upon its stationery and advertising matter, words to the effect that its depositors are protected by the depositors' guaranty fund of the State of Nebraska, or because banks which, after examination, are given a

certificate are required to display the same in their places of business? Lawyers, doctors and dentists receive permits authorizing them to practice their professions, but the State is not a party to the practice. Before me lies a national bank note which upon its face bears this inscription:

> "NATIONAL CURRENCY, SECURED BY UNITED STATES BONDS DEPOSITED WITH THE TREASURER OF THE UNITED STATES OF AMERICA."

Will anybody contend that the government of the United States is liable for the payment of the bill, or *particeps criminis* in national banking?

It may be asked:

> "Why not as well enact a law that all persons who borrow money from the banks shall contribute a part of the money which they borrow to a general fund to guarantee the prompt repayment of the banks' money so borrowed, and to make up to the banks any deficiency arising from the insolvency of the borrower?"

At the hearing it was asked:

> "Why not require one street railway company to contribute to pay the losses of another street railway company?"

An adequate answer will be found in the inaptness of the illustrations; a complete answer is stated by the Supreme Court of Kentucky in the case of *Berea College v. Commonwealth*, 123 Ky., 224, where it is said:

> "Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the State might attempt to regulate, under the same power, the right of the races to work together in the same

fields or factories, or to mingle together at all. A sufficient answer to this is that each proposed application of power is to be determined upon the circumstances under which it is sought to be applied. If it is arbitrary, unreasonable, or oppressive, it will be denied. Nor is it a legitimate argument to prove a negation of power by showing wherein it may be abused."

V.

Are the provisions of the act separable, or is the entire act void?

It is said by this court in *Railroad Company v. Shutte*, 103 U. S., 142:

"Undoubtedly a constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will. In such a case the whole statute is void; but in this, as in every other case of statutory construction, all depends upon the intent of the legislature as shown by the general scope of the law."

To the same effect are the decisions of this court in:

Presser v. Illinois, 116 U. S., 452.
McPherson v. Blacker, 146 U. S., 1.
Reagan v. Farmers Loan & Trust Co., 154 U. S., 395.

There are fifty-four plaintiffs in this case, two unincorporated; it is said in the bill that at the date of the passage and approval of the act there were thirteen private bankers in the state, and it is alleged that these will be compelled to "go out of banking business as private bankers and are prohibited continuing to do business as private banks."

It is apparent from the provisions of the act that what the legislature intended was to provide a method of securing bank deposits. It is objected that the act authorizes the State Banking Board to pay a reward out of the guaranty fund for the apprehension and conviction of any persons violating the provisions of the act. This provision, even if in conflict with the state constitution, does not invalidate the remainder of the act, for it is clearly separable. Again, if it were to be conceded that the act is invalid in so far as it deprived individuals of the right of engaging in the banking business, which point is not conceded, yet the act, so far as it relates to the rights of individuals, is clearly separable from the provisions of the act relating to corporations, and as to the latter, the act may be sustained, even if held invalid as to the former.

A statute of Kentucky made it unlawful for any corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races should both be received as pupils for instruction; and provided a penalty for any person or corporation which should violate its provisions. Berea College was indicted, charged in one indictment with operating a school for white and negroes in violation of the act. In another indictment is was charged that the defendant maintained and operated a college where persons of the white and colored races were received for instruction. In the case of *Berea College v. Commonwealth*, 123 Ky., 209, it was held that the law was valid as to the incorporation and invalid as to persons. Error proceedings were prosecuted to the Supreme Court of the United States; the case is reported under the same title in 211 U. S., 45. The judgment of the State court was affirmed. It is said, page 47:

> "The rule that a part of a statute may be unconstitutional and other parts may be valid only applies

> where the parts are clearly separable and may well stand alone. This rule does not apply to cases where the enforcement of the unconstitutional part affects the complaining party just as much as the enforcement of the constitutional parts. The constitutional part of the act will not be enforced where other parts are unconstitutional unless the court can assume that the legislature would have passed the act if the void part had been omitted."

Within the meaning of the rule stated above, can the court assume that the legislature would not have passed the act had it only applied to corporations? In view of the fact that it is only alleged, and the fact is, that there were thirteen private bankers in the State, less than two per cent of the banks subject to State supervision, it can not be successfully maintained that the legislature might not have passed the act, by its terms making it applicable to corporations only. It is true the act does prohibit the transacting of banking business as defined in the act, save through and by the means of a corporation, but the clear intent of the legislature was to provide for the security of deposits; and the legislature evidently had in view, and is presumed to have known, that by far the greater part of the banking business of the State was conducted by banking corporations and not by private individuals. The provisions of the act, so far as individuals are concerned, and corporations, are clearly separable, and as to corporations, the act may be valid even if invalid as to individuals under the decisions of the supreme court of the United States.

* * *

If it be that under this law the plaintiffs may be deprived of engaging in the banking business, they come within the rule stated by the Supreme Court of Indiana in the case of *Adams Express Co. v. State, supra:*

> "It has never been denied that in the exercise of the police power, property rights may be sacrificed,

natural privileges curtailed, and liberties restricted or taken away. As the public peace, safety and wellbeing are the very end and object of free government, legislation which is necessary for the protection and furtherance of this object cannot be defeated on the ground that it interferes with common law rights of some citizens, or deprives them of such rights."

In *Munn v. Illinois,* 94 U. S., 126, it was said:

"Property does become clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

Again, at page 133, it is said:

"It matters not in this case that these plaintiffs in error had built their warehouse and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means of carrying it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns."

VI.

CONCLUSION.

It is said by Russell in his work on "Police Powers of the State," page 186:

"We may now lay down certain general conclusions as the existing result of development by the decisions at the present stage.

1. "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by a legislature of a State essential to the safety, health, peace, good order, morals and convenience of the people of the State.
2. "The courts are empowered to adjudge whether any particular law is an invasion of the rights secured by the constitution, but will strain a point to sustain the particular law.
3. "The Fourteenth Amendment, while it authorizes the Federal courts to declare invalid State laws, abridging the rights of citizens or denying due process of law, was not intended to interfere with the power of the State to protect the lives, liberty and property of the citizens of the States, and to promote education, good order, health, peace and morals.
4. "The Fourteenth Amendment does not take from the State the police powers which were reserved at the time of the adoption of the original Constitution and the Tenth Amendment.
5. "When property, either of a corporation or of an individual, or its employment, is affected with a public use, the business in which it is used is subject to the control of the Legislature of the State in all respects which, in the judgment of the Legislature, are necessary to protect the public against danger, injustice and oppression, and the Legislature may fix a charge for the use of property, subject to judicial review, as to reasonableness.

6. "The use of property is distinguished from property itself, and this use is held to be subject to the police power of the State; and such use may be taken away for the public good, without compensating the owner; as in the case of Mugler and his brewery.

9. "There can be no contract and no irrepealable legislation upon certain governmental subjects. All legislative acts concerning public interests are public laws. Every succeeding Legislature possesses the same jurisdiction and power as its predecessors with respect to repeal and modification; and it is vital to the public welfare that each Legislature should be competent at all times to do whatever varying circumstances and pressing exigencies may require.

11. "Whatever is contrary to public policy or inimical to the public interests, is subject to the police power of the State and is within legislative control. And, in the exercise of such power, the Legislature is vested with large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry."

* * *

It is respectfully submitted:

First That the statute, the constitutionality of which is here questioned, does not deprive the unincorporated plaintiffs of any rights guaranteed to them by the Constitution of the United States, or the Constitution of the State of Nebraska.

Second. That all banks in this state, whether incorporated or private, may be required to comply with the guaranty features of the law.

Third. That the State may, in the exercise of its power of sovereignty, confine all of the banking business of the state to corporations.

Fourth. That the incorporated plaintiffs have, and

can have, no contract with the State which prevents the Legislature from placing additional duties and requirements upon them, even to the extent of requiring them to set aside a per cent. of their deposits for the purpose of securing depositors.

Fifth. That the act is constitutional as a whole, but if unconstitutional as to paying rewards out of the guaranty fund, or in any other of its provisions, those provisions are separable, and the other portions of the act are valid.

Sixth. That the judgment should be reversed and the bill dismissed.

CHAS. O. WHEDON,
Solicitor for Defendants.

Office Supreme Court, U.
FILED.
NOV 30 1910
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 445.

ASHTON C. SHALLENBERGER, GOVERNOR OF THE STATE OF NEBRASKA; SILAS R. BARTON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, *ET A.L, APPELLANTS*,

VS.

THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA, *ET AL.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA ET AL.

JOHN LEE WEBSTER,
WILLIAM V. ALLEN,
Solicitors for Appellees.

REED PRINTING COMPANY

SUPREME COURT OF THE UNITED STATES.

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—o—

BRIEF FOR THE FIRST STATE BANK OF HOLSTEIN, NEBRASKA ET AL.

—o—

STATEMENT OF THE CASE.

The bill was filed by *54 incorporated* and *2 private* banks in the State of Nebraska on their own behalf and on behalf of all other banks similarly situated to test the constitutionality of the Banking Act passed by the Legislature of Nebraska, approved March 25th, 1909, entitled "An Act for the regulation, supervision and control of the Business of Banking, and to provide penalties for its violation, repealing Chapter Eight (8) of the Compiled Statutes of Nebraska, of 1907, and all acts and parts of

acts inconsistent herewith;" and to enjoin the Banking Board by said Act created, to-wit, the Governor, the Auditor of Public Accounts and the Attorney General, from enforcing the provisions of said Act, and particularly enjoining the said Banking Board from attempting to wind up the business of the private banks in the State of Nebraska, and from requiring the incorporated banks of the State of Nebraska to accept the terms and provisions of said Act, and enjoining the said Banking Board from assessing, setting apart and appropriating the Guaranty Fund provided for in said act. The text of the Nebraska Bank Guaranty Deposit Law is printed in full in the record, pp. 18 to 36.

The United States Circuit Court for the District of Nebraska ruled the Act to be in conflict with Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law;" and to be in conflict with Sec. 1, of Art. 1, of the Constitution of Nebraska, which declares that all persons have certain inalienable rights, and "among these are life, liberty and the pursuit of happiness," and to be in violation of Sec. 3 of the same article, which provides that "no person shall be deprived of life, liberty or property without due process of law," therefore unconstitutional and void, and entered its decree enjoining the appellants from enforcing said Bank Guaranty Deposit Act. Temporary Injunction, rec. p. 46. Final Decree, rec. p. 54.

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SUMMARY OF BILL OF COMPLAINT.

Introduction. States the names of the parties, their relation to the suit and jurisdictional matters.

Par. I. States the provisions of Nebraska Banking Act of 1895, and as amended in 1903 and 1905, creating Banking Board, their duties, etc.

Par. II. States the provisions of Secs. 5, 6 and 7 of said Act of 1895 relating to the obligations and duties of incorporated and private banks thereunder—the granting to them of charters to do a banking business, etc.

Par. III. States that each of complainant banks had obtained charters under said Act of 1895, and had invested their capital accordingly, relying thereon, and were doing business thereunder.

Par. IV. States that the Bank Guaranty Deposit Act of 1909, by Sec. 2, declares it *unlawful for any partnership, firm or individual to engage in or transact a banking business,*" and limits the banking business to *incorporated* banks—further conditioned that they "*shall have complied* with all the provisions and requirements" of said Bank Guaranty Deposit Act, and to that end created a new Banking Board—the appellants herein.

Par. V. States the names of thirteen (13) private banks which were engaged in business at the time of the approval of the Bank Guaranty Deposit Law; that by said Act said banks are prohibited from continuing in business and subjected to penalties if they attempt to continue in business, and if they do not suspend business the newly created Banking Board will take pos-

session thereof and wind up their affairs; whereby said Act deprives said private banks of their natural inherent right to do a banking business; deprives them of their property invested in the banking business without due process of law and without compensation in violation of Sec. 1 of Art. 14 of Amendments to the Constitution of the United States, and of Secs. 1 and 3 of Art. 1 of the Constitution of Nebraska, and impairs the contract obligations existing between the State of Nebraska and said banks in violation of Sec. 10 of Art. 1 of the Constitution of the United States, and in violation of Secs. 16 and 21 of Art. 1 of the Constitution of the United States. To require said banks to discontinue or to have their affairs wound up by a receiver under said Act would result in loss and damage to each of said parties in a sum exceeding $2,000, exclusive of interest and costs.

Par. VI. States that the appellants under said Bank Guaranty Deposit Act mean to take possession of all records of the existing Banking Board and to prohibit all banks from continuing business unless they apply for and obtain new charters issued by the appellants, and which charters shall be an acceptance of all the obligations of the Bank Guaranty Deposit Act and which would result in depriving them of property without due process of law and without compensation in violation of Sec. 1, Art. 14, of the Constitution of the United States, and in violation of Secs. 1 and 3 of Art. 1 of the Constitution of Nebraska, and would impair the obligations of

the contracts between the State and the Banker in violation of Sec. 2 of Art. 1 of the Constitution of the United States and of Sec. 16 of Art. 1 of the Constitution of Nebraska.

Par. VII. States that under Sec. 14 of the Act all banks must make to the appellants a report within sixty (60) days after the Act goes into effect and that under Sec. 15, appellants, if satisfied with the bank reports, shall issue certificates stating the bank *has complied with the laws for the protection of depositors and whereby* all banks in Nebraska shall be *required* to accept of the provisions of said Act and to *comply with its guaranty provisions* by *contributing to the guaranty fund* in violation of Sec. 1, Art. 14, Constitution of the United States, and of Secs. 1 and 3, Art. 1, Constitution of Nebraska, and impairing obligations of contracts in violation of Sec. 10, Art. 1, Constitution of the United States, and of Sec. 16, Art. 1, Constitution of Nebraska.

Par. VIII. States that under Sec. 20 of said Act a bank which does any business without first having obtained a new charter as provided in Sec. 11, and a new certificate as provided in Sec. 14, shall be subject to a penalty of Fifty ($50) Dollars per day, and if *banks do not agree to contribute to guaranty fund* they will be deprived of their personal and property rights to do a banking business within the State—all in violation of the constitutional provisions before cited.

Par. IX. States that under Sec. 44 it is provided every bank shall be subject to an assessment for

the guaranty fund, and by Sec. 45 there shall be a semi-annual assessment up to and including January 1, 1911, of one-fourth of one per cent of the average daily deposits and semi-annual thereafter of one-twentieth of one per cent of the average daily deposits. Said assessments when levied "shall be and constitute what shall be designated as a depositors' guaranty fund payable to the State Banking Board on demand for the uses and purposes hereinafter provided." In the event that the guaranty fund shall become depleted special assessments are provided for not exceeding one per cent in any one year. By Sec. 52 of the Act, in the event of insolvency of a bank if the cash in the hands of a receiver is insufficient to pay depositors in full, the State Banking Board shall draw against the depositors' guaranty fund for the deficiency. The guaranty fund becomes a general fund to be appropriated by the Banking Board to the payment of depositors in any bank that may become insolvent, *whereby each bank is made to contribute out of its assets the moneys assessed against it to be used for the payment of depositors of some other bank.*

Which assessment for the guaranty fund upon the banks in the state will amount to $182,485.75, and the gross assessment provided for in Sec. 45 will amount to $766,440.15, and upon each of the complainant banks will exceed the sum of $2,000, exclusive of interest and costs. And avers that Secs. 44, 45, 47 and 52 of the said Bank Guaranty Deposit Act operate to take the property of each of the banks without

compensation and appropriates the same to the payment of private debts of other banks without due process of law, in violation of Sec. 1, Art. 14 of the Constitution of the United States, and of Secs. 1 and 3 of Art. 1 of the Constitution of Nebraska, and operate to impair contract obligations existing between the State and the stockholders in said bank by increasing the contract obligations which the stockholders assumed in violation of Sec. 10 of Art. 1 of the Constitution of the United States and of Secs. 16 and 21 of Art. 1 of the Constitution of Nebraska.

Par. X. States that by Sec. 52, claims of depositors and holders of exchange shall have priority over all other claims, except taxes, and shall be a first lien on all the assets of the bank, including liability of stockholders, and shall be immediately payable out of the available cash in the hands of the receiver. The claims of other creditors are postponed until after payment in full to depositors and holders of exchange, and if these shall exhaust all the assets of the banks, other creditors are excluded and deprived of the right to collect their claims, and by reason whereof Sec. 52 impairs the obligations of the contract rights of all other creditors in violation of Sec. 10 of Art. 1, and of Sec. 1 of Art. 14 of the Constitution of the United States, and of Secs. 1 and 3 of Art. 1, and of Secs. 1, 3, 16 and 21 of Art. 1 of the Constitution of Nebraska.

Par. XI. States that by Sec. 6 a secretary shall be appointed at a salary of $3,000 a year, a clerk

$1,500 per year. By Sec. 9, Bank Examiners shall receive $1,800 a year and expenses not exceeding $1,000 per year, and that the banks shall pay to the general funds sums of money based on their capitalization from $15 to $50 per year to pay the salaries of said officers, whereby the banks are required to pay the salaries of state officers. By Sec. 60 the Banking Board may pay out of the guaranty fund rewards for the apprehension and conviction of violators of the Act not exceeding $500 in each case. Said provisions are an appropriation of the funds of the banks to the payment of salaries of state officers, and of the guaranty fund for the prosecution of violators of the criminal laws of the state, whereby Secs. 6-9 and 60 are unconstitutional and void, being in violation of Sec. 10, Art. 1 and Sec. 1 of Art. 14 of the Constitution of the United States, and of Secs. 1-3 and 21 of Art. 1 and Sec. 19 of Art. 3 of the Constitution of Nebraska.

Par. XII. States that all sections before complained of as being in violation of the Constitution of the United States and of the State are material and essential parts of said Act, and without which the Act would not have been passed by the legislature nor approved by the governor, whereby the entire Act is null and void in violation of the provisions of the Constitution of the United States and of the State of Nebraska before referred to. That the purpose and scope of the Act is to extend the credit of the State to individual banks and to banks not entitled to equal credit with other banks, and thereby

enable some banks to have their credit extended beyond their merits so as to induce persons to become depositors therein, in violation of Sec. 3 of Art. 12 of the Constitution of Nebraska, which provides "the credit of the State shall never be given or loaned in aid of any individual association or corporation." There follow averments relating to the intent of the appellants to compel the complaining banks and all other banks to become contributors to the guaranty fund, to make assessments upon the assets of each bank based upon its daily deposits, etc., and appropriate prayer for injunction.

Final decree. The Circuit Court entered its decree overruling the defendants' demurrer and granted the injunction as prayed enjoining the newly created Banking Board from enforcing the said Bank Guaranty Law on the ground that the same was unconstitutional and void. For temporary injunction see rec. p. 46; final decree, rec. p. 54.

Assignment of errors. The defendants, the appellants herein, filed their assignment of errors, rec. p. 58.

"First. In decreeing that the said complainants by their bill of complaint made and stated a cause of action which entitled them to a restraining order and temporary injunction."

"Second. In decreeing that it appears from the said bill of complaint that the complainants have a cause of complaint, and that they have no adequate and complete remedy at law."

"Third. In decreeing that the complainant corporations, and the individuals joined with them, have a joint interest in the subject matter mentioned in the said bill of complaint, and that the

several parties complainant are properly joined therein."

"Fourth. In overruling and denying the objections to granting the restraining order and injunction prayed for in said bill of complaint, and refusing to dismiss said suit.

"Fifth. In overruling and denying the demurrer of said defendants to the complainants' said bill of complaint, and in ordering and decreeing that the preliminary order of injunction theretofore granted be, in all respects, continued and made perpetual."

"Sixth. In holding and decreeing that the act of the legislature of the State of Nebraska, entitled 'An Act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation, repealing Chapter eight (8) of the Compiled Statutes of Nebraska of 1907, and all acts and parts of acts inconsistent herewith,' approved March 25th, 1909, is unconstitutional."

"Seventh. In holding and deciding that said act of the legislature is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States."

"Eighth. In holding and deciding that said act of the legislature is in conflict with section 3, article 1, of the Constitution of the State of Nebraska."

SOME EXCERPTS FROM THE NEBRASKA BANK GUARANTY LAW, THE FULL TEXT OF WHICH IS FOUND IN THE RECORD, PP. 18-36.

"Sec. 2. It shall be unlawful for any corporation, partnership, firm or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by means of a corporation duly organized for such purpose under the laws of this state. It shall be

unlawful for any corporation to receive money upon deposit or transact a banking business under the laws of this state until said corporation shall have complied with all the provisions and requirements of this act. Any violation of the provisions of this section shall subject the corporation, partnership, firm or individual so offending to a penalty of twenty-five ($25.00) dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business." * * *

"Sec. 11. It shall be unlawful for any person or corporation to conduct a bank or to engage in or transact a banking business in this state without having first obtained a charter from the State Banking Board in the manner hereinafter provided, which charter shall issue only to corporations duly organized for the transaction of such business." * * *

"Sec. 14. Every corporation transacting a banking business under the laws of this state, shall, within sixty days after the taking effect of this act, file with the State Banking Board, a full, complete and detailed report of its condition, as provided for in Section 15 of this act, and it shall be the duty of the State Banking Board upon examination of the report and approval of the same, if satisfied that such corporation meets the requirements of this act, to issue to said banking corporation, a *certificate stating that said banking corporation has complied with the laws of this state for the protection of bank depositors*, and that its depositors are protected by the depositors' guarantee fund of the state of Nebraska."

"Sec. 44. For the purpose of providing a guaranty fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this State, shall be subject to assessment, to be levied, kept, collected and applied as hereinafter provided."

"Sec. 45. Within thirty days after the taking effect of this act and on the first day of December, 1909, and on the first day of June and December of each year thereafter, every corporation engaged in banking under the provisions of this act, shall make and file with the State Banking Board a statement in writing, verified by the oath of its president, vice-president or cashier, showing the average daily deposits in its bank for the preceding six months, exclusive of public money otherwise secured. And on the first day of the month next succeeding the date fixed for the making and filing of such statement, the State Banking Board shall levy assessments against the capital stock of each of said banking corporations as follows: Within sixty days after the taking effect of this act, one-fourth of one per cent of the average daily deposits, as shown by the first statement of such average daily deposits required to be made and filed by the provisions of this section; on the first day of January, 1910, one-fourth of one per cent of the average daily deposits; as shown by the statement required to be made and filed on the first day of December, 1909; on the first day of July, 1910, *and* one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of June, 1910; and on the first day of January, 1911, one-fourth of one per cent of the average daily deposits as shown by the statement required to be filed on the first day of December, 1910, and on the first day of July and January of each year thereafter, one-twentieth of one per cent of the average daily deposits, as shown by the statement thereof required to be made and filed next preceding such assessment."

"Sec. 45a. Any bank organized subsequent to the date when this act takes effect shall pay into the Depositors' Guaranty Fund four (4) per cent of the amount of the capital stock, when such bank opens for business, which amount shall con-

stitute a credit fund, subject to adjustment on the basis of said bank's average daily deposits, as shown by the first two semi-annual statements, required by section 45 of this act. The Banking Board is authorized and empowered to make such an adjustment of the rates of assessments to be paid by any bank which engages in the banking business subsequent to the time when this act takes effect, as shall require such bank to contribute to the Depositors' Guaranty Fund a just and equitable sum, and the State Banking Board shall adjust assessments of such bank so that the first two assessments, together with the credit fund of four (4) per cent of its capital stock paid in by said banks when it begins business, shall at least equal one (1) per cent of the average daily deposits of said bank as shown by the two first semi-annual statements required by section 45 of this act." * * *

"Sec. 46. As soon as said assessments are respectively levied, the banking corporations against which the same are levied, shall be notified of the amount of such assessment levied against them respectively, by the Secretary of the State Banking Board, and said banking corporations shall thereupon set apart, keep and maintain in their said banks the amount thus levied against them and the amounts thus levied, kept and maintained shall be and constitute what shall be designated as a Depositors' Guaranty Fund, payable to the State Banking Board on demand for the uses and purposes hereinafter provided."

"Sec. 47. If the Depositors' Guaranty Fund shall, from any cause prior to July 1, 1910, be depleted or reduced to an amount less than one-half of one per cent of the average daily deposits, or subsequent to July 1, 1910, be depleted or reduced to an amount less than one per cent of the average daily deposits, as shown by the last semi-annual statements thereof filed, the State Banking Board shall levy a special

assessment against the capital stock of the corporations governed by the provisions of this act, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits in any one year." * * *

"Sec. 52. The *claims of depositors, for deposits,* and *claims of holders of exchange, shall have priority over all other claims,* except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver, available for such purpose, be insufficient to pay the claims of depositors, the court in which the receivership is pending, or a judge thereof, shall determine the amount required to supply the deficiency and cause the same to be certified to the State Banking Board, which shall thereupon draw against the Depositors' Guaranty Fund in the amount required to supply such deficiency, and shall forthwith transmit the same to the receiver, to be applied on said claims of depositors." * * *

"Sec. 60. For the purpose of carrying out the provisions of this act, the State Banking Board is hereby authorized and empowered to offer and pay out of the Depositors' Guaranty Fund rewards for the apprehension and conviction of any person or persons violating the provisions of this act. Such rewards not to exceed in any case five hundred ($500.00) dollars." * * *

"Sec. 61. Where no other punishment is provided herein, any person violating any of the provis-

ions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five, nor more than three hundred ($300.00) dollars, or by imprisonment in the county jail for not less than thirty, nor more than ninety days, or both, in the discretion of the Court."

BRIEF OF ARGUMENT.

I.

UNDER THE CONSTITUTION OF NEBRASKA AND THE PRIOR BANKING LAWS OF THE STATE, PARTNERSHIPS, FIRMS AND INDIVIDUALS HAVE THE RIGHT TO ENGAGE IN BANKING BUSINESS.

Constitution. Art. 1. Sec. 1.

"All persons are by nature free and independent, and have certain inherent and inalienable rights among these are life, liberty, and the pursuit of happiness."

Sec. 3. "No person shall be deprived of life, liberty or property, without due process of law."

Sec. 16. "No bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

Sec. 21. "The property of no person shall be taken or damaged for public use without just compensation therefor."

STATUTES, CHAPTER 8. BANKS, ACT OF JULY 9, 1895.

Sec. 1. "Provides that the State Banking Board 'shall have general supervision over, and control of any and all corporations, *partnerships, firms* and *individuals* transacting a banking business under the laws of this state.' "

Sec. 2. "Every corporation, *partnership, firm* or *individual* transacting a banking business under the laws of, and within this state, shall be subject to the provisions of this act, and regulated by the State Banking Board."

Sec. 3a. "Provides the secretary of board shall make a report to the Governor, etc., showing the 'condition of the incorporated, private and saving banks,' " etc.

Sec. 4. "It shall be unlawful for any corporation, *partnership, firm* or *individual* to transact a banking business unless such corporation, *partnership, firm* or *individual* shall have first obtained from the State Banking Board a Charter as provided by Sec. 7 of this Chapter. No Charter shall hereafter be issued * * * to any corporation, *partnership, firm* or *individual* to transact such business unless such corporation, *partnership, firm* or *individual* has property of cash value as follows," etc.

Sec. 5. "Every bank, corporation, *partnership, firm* or *individual* transacting a banking business 'shall file reports,' " etc.

The phrase, *corporation, partnership, firm* or *individual* is used in Sec. 6, Sec. 7, Sec. 11, Sec. 12, Sec. 13, Sec. 14, Sec. 15, Sec. 17, Sec. 18, Sec. 20, Sec. 22, Sec. 23, Sec. 24, and are made subject to the same regulations.

Sec. 26. "No *partnership, firm* or *individual* transacting a banking business in this state shall be permitted to carry any note or obligation of any such *partnership,* or *firm* or *individual* of any of the members of such *partnership* or *firm* as any part of the assets of the bank."

The phrase corporation, *partnership, firm* or *individual* transacting a banking business is again used in Sec. 27, Sec. 29, Sec. 31, Sec. 34.

Sec. 7 of Act of 1895 was amended 1905, providing for the issue of Charter to corporations, *partnerships,*

firms and *individuals* to transact a banking business. (See Compiled Statutes 1905, p. 155, Ch. 8, Sec. 7.)

The prohibition of partnerships, firms or individuals to do a banking business, and limiting the business to *corporations,* first appears in Guaranty Deposit Law now in question.

At the time of the enactment of the Guaranty Deposit Law there were thirteen private banks in the state, two of which are complainants herein.

II.

THE GUARANTY DEPOSIT LAW IS UNCONSTITUTIONAL AND VOID IN THAT BY SECTION 2 IT DEPRIVES COPARTNERSHIPS, FIRMS AND INDIVIDUALS OF THEIR NATURAL, INHERENT AND VESTED RIGHT TO CONTINUE THEIR EXISTING ESTABLISHED AND CHARTERED BANKING BUSINESS, AND SUBJECTS THEM TO A PENALTY OF $25 PER DAY, AND THEIR PROPERTY TO BE SEIZED AND THEIR BUSINESS TO BE CLOSED OUT BY A RECEIVERSHIP IF THEY ATTEMPT TO CONTINUE THE BANKING BUSINESS.

Sec. 2. "It shall be unlawful for any corporation, partnership, firm or individual to engage in or transact a banking business within this state on and after the taking effect of this act, except by means of a corporation duly organized for such purpose under the laws of this state." * * *

"Any violation of the provisions of this section shall subject the corporation, partnership, firm or individual so offending to a penalty of twenty-five ($25.00) dollars for each day of the continuation of such offense, and be cause for the appointment of a receiver as hereinafter provided, to wind up such banking business." Rec. p. 18.

It is averred in the bill of complaint (rec. p. 7) that at the time when the Guaranty Deposit Law was enacted there were thirteen private banks in Nebraska, each having charters granted by the state under Sec. 7 of the General Banking Act of 1895, as amended by the Act of 1905, to do a banking business. The question is not whether the business of banking, when conducted by individuals or partnerships, may be regulated. That much we admit. Our contention is that the right to regulate does not include the right to prohibit or destroy; nor to compel partnerships, firms or individuals to transfer their properties and business to corporations.

The appellants insist that banking is a business of such a public nature that the state, under its police power, may prohibit individuals, firms and partnerships from engaging in the banking business *and may, under Sec. 2 supra, wind up the affairs of such banks by a receiver.* We insist that the business of banking is one in which individuals, of right, have engaged in from time immemorial, and is one of the inalienable rights recognized by the Declaration of Independence, and one of the inalienable rights protected in the citizen by Sec. 1 of 14th Amendment to the Constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," and recognized by Sec. 1 of Art. 1 of the Constitution of Nebraska, which declares that "all persons have certain inalienable rights, and among these are life, liberty and the pursuit of happiness," and by Sec. 3 of the same article, which provides that "No person shall be deprived of life, liberty or property without due process of law."

The opinion of the Circuit Court in this case it is said, rec. p. 49:

> "The banking business is one of the ancient and ordinary occupations, and has been and is recognized as a lawful business, not only in the State of Nebraska, but in all States of the Union, and in general, in all countries that have developed civilization and commerce. It has not been regarded as a business of such harmful tendencies that society might entirely forbid its exercise."

"At common law the right of banking in all its ramifications belonged to individual citizens and might be exercised by them at pleasure." *Taney, C. J.*, in *Bank of Augusta v. Earle*, 13 Peters, 519, 595-6.

In *Bank of California v. San Francisco*, 142 Cal., 276, (100 Am. St. Rep., 130) the court said:

> "Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a *grocery or dry goods business* is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual, or any number of individuals, may, under such regulations as the state in the exercise of its police powers may legally make, engage therein, without any grant from the state."

In *State v. Scougal*, 3 S. D. 55, 44 Am. St. Rep. 756, the court in speaking to the same point said, "But at common law banking in all its branches was free to all and belonged to the citizens of the country generally." * * * "When, therefore, banking is said to be a franchise, it must, we think, be understood as referring to the privilege of issuing demand notes to circulate as money." * * * "All the other are incidental powers of banking and are left to citizens as held by them at common law." * * * "No

one will, we apprehend, controvert the proposition that, under the common law, banking in all its branches was absolutely free to all."

Many cases recognize the right to regulate banking in a reasonable degree and at the same time recognize the right of *private* banking. This was so in cases cited *supra.* In *Ex Parte Pittman,* 99 Pac. 700, (31 Nev. 56), the court held that the state could make it a criminal offense for a bank to receive deposits when known to be insolvent, but said: "that the business of banking is a lawful business in which it is the *inherent* right of every citizen to engage will not be questioned." Said statement was quoted and reaffirmed in *Marymont v. Nevada State* Banking Board, 111 Pac. 295, hereinafter cited and quoted from.

In *International Trust Co. v. American Loan & Trust Co.,* 65 N. W. 78, is a case in which *Mitchell, J.,* speaking for the Supreme Court of Minnesota, said, p. 79:

> "The right to receive money on general or special deposit, to lend money on securities, to discount or purchase bills, notes, or other evidences of indebtedness, are not franchises or privileges. No legislative authority is necessary to authorize a person or partnership to engage in such kinds of business. *The right to do so belongs to all citizens of common right.*"

The state of Nebraska has heretofore at all times recognized the natural and inherent right of individuals and firms to engage in the banking business, and has granted charters to them to conduct such business. It does not follow because the state has the right to regulate a business that it has a right to prohibit the business. The state has a right to regulate by licensing, or otherwise, hack drivers, dairymen, bakers, peddlers, auction-

eers and other avocations, but it does not follow that the state has the right *to prohibit private persons from carrying on said avocations.* Much less has the state the power to provide that said avocations shall only be carried on by corporations.

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CASES WHICH HAVE RULED ON THE DIRECT POINT WHETHER THE STATE CAN OR CANNOT PROHIBIT BANKING BY UNINCORPORATED PERSONS OR ASSOCIATIONS.

The first case that directly ruled that banking might be limited to corporations is *State v. Woodmansee,* 1 N. D. 246, (46 N. W. 791), but the opinion of the court in that case was not followed by *State v. Scougal,* 3 S. D. 55, which directly held a law to be unconstitutional which limited banking to corporations. *Noble State Bank v. Haskell,* 97 Pac. 590, (now before this court) held the Statute of Oklahoma to be constitutional which confined banking to corporations. Next in order came the case at bar, in which United States Circuit Court, District of Nebraska, *Van Devanter, Circuit Judge,* and *T. C. Munger, District Judge,* presiding, held the Nebraska Bank Guaranty Law unconstitutional for the reason among others that it limited the banking business to corporations and prohibited partnerships, firms and individuals from continuing the business.

Weed v. Bergh, 141 Wis., 569, held a statute of Wisconsin to be constitutional which confined banking to corporations, but said opinion, although handed down February 1, 1910, makes no reference to the opinion of the United States Circuit Court in the case at bar.

On October 1, 1910, the Supreme Court of Nevada (*Marymont v. Nevada State Banking Board,* 111 Pac., 295), held a statute of Nevada to be unconstitutional which confined banking to corporations. Said last named court in speaking of *State v. Woodmansee,* 1 N. D. ,246, and *Weed v. Bergh,* 141 Wis., 569, said:

> "We believe that through inadvertence they have misapplied to ordinary banking one or two cases relating to insurance, and a few others bearing upon the restrictions and limitations which long ago were properly held to pertain to banks that issued notes to circulate as money, a government prerogative, when those institutions were under the control of the states. As we distinguish these cases, *Weed v. Bergh* is without support, except by the decision in *State v. Woodmansee,* which is, in turn, unsupported."

State v. Scougal, 3 So. Dak. 55 (44 Am. St. Rep. 756, 51 N. W. 858) is a case in point. It declared a Statute of that State to be unconstitutional and void because it made it unlawful for individuals or firms to continue the banking business unless they became incorporated.

The court said:

> "And it may be proper to observe that in neither the charter granted by the British parliament to the Bank of England, nor in the National Banking Law of the United States, is there any prohibition of the privilege of carrying on the business of banking, other than issuing demand notes to circulate as money, by any individual, co-partnership or corporation." * * *
>
> "No one will, we apprehend, controvert the proposition that, under the common law, banking in all its branches was absolutely free to all." * * * "But as to the other or incidental powers of banking, specified in subdivision 7, section 4,

we are unable to find that they ever became, either at common law or under the state or national constitution, a franchise. These are privileges that always belonged to the citizens of the country generally. They never belonged to the sovereign, or pertained to sovereignty in any manner. They have never been conferred upon the national government or the state government. Whence, then, did the legislature of this state derive its power to farm out these privileges to corporations, and to deny to the, individual citizens, the right to exercise them, which he and his ancestors have from time immemorial possessed?

"Can the legislature create a franchise by depriving citizens of their rights, and then bestow it upon another at will? If it can, then the citizen has no rights that may not be taken from him under this new theory of a franchise created by the legislature. Concede to the legislature the right to make the incidental powers of banking a franchise, under what principle of law can it be deprived of the power of making merchandising, blacksmithing or farming a franchise, and conferring the privilege upon corporations only? In our opinion no such power exists in the legislature as that of creating a franchise out of the natural and common rights of the citizens." * * *

The court held it was not within the police power of the state to confine banking to corporations and to deprive citizens of their common law right to do a banking business, and among other things said:

"But under this power it is not competent for the state to prohibit the citizen from carrying on any trade, occupation, or business that is not offensive to the community or injurious to society. The business may be regulated, but not prohibited." * * *

> "The government, under the guise of regulation, cannot prohibit or destroy. It cannot deprive any citizen of his right to pursue a calling, occupation, or business, not necessarily injurious to the community, who is willing to comply with all reasonable regulations imposed upon it. It can never encroach upon the liberty of the citizens or invade the rights of property protected by the constitution: *In re* Jacobs, 98 N. Y. 98; 50 Am. St. Rep. 636. By the act in question the state admits that banking is not, of itself, injurious to the community, as it confers upon corporations that may be organized under the act full power to carry on the business of banking as provided in the act; and the number of banking corporations that may be organized is not limited." * * * * * *
>
> "The artificial persons created by the act may carry on the business, but no natural person shall be permitted to do so. The banker, therefore, who has devoted years to the acquisition of that knowledge of the business that enables him to conduct it successfully, who has invested his means in a banking building, vaults, furniture, etc., and who has invested his capital in the business of banking, must close his bank, and find other employment for his capital, other occupations in which to employ his talents and abilities, and other methods for providing for the support of himself and family."

In *Commonwealth v. Vrooman,* 164 Pa. St., 306; 30 Atl. 217, the court by a majority opinion sustained the constitutionality of a statute of Pennsylvania which limited the right to corporations to issue policies of fire insurance. *Williams, J.,* in his opinion held to the view that the statute was not in violation of the 14th amendment on the ground that the "privileges or immunities of citizens of the United States" was not invaded when a statute denied privileges or immunities *to its own citi-*

zens. This narrow view of the situation overlooked the "liberty and pursuit of happiness" which belongs to all citizens of the state, as well as of the United States.

Dean, J., in his dissenting opinion, which was concurred in by *Sterrett, C. J.,* and *Green, J.,* said:

> "The right to limit the transaction of the business of fire insurance to incorporated associations is not in express terms forbidden; but the right of natural persons to make contracts of indemnity against loss by fire on shipwreck was for centuries before the adoption of the constitution a common law right."

The judge then said that all authorities agree that the right to make contracts and "contracts are protected by the constitution"; and all agree that the business of fire insurance may be regulated.

> "But can the legislature absolutely forbid the making of such a contract by individuals, and confer on corporations a monopoly of such business? Is the business of fire insurance deleterious to the public? If so, the legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class, *natural persons,* from entering into them, and especially empowering another and numerically a very much smaller class, artificial persons, to make them? In so doing the state grants a monopoly in a particular business to a particular class." * * * "This act is not obnoxious to the constitution because it authorizes corporations to insure against fire, but because it prohibits *individuals doing a like business.* It grants a monopoly of a particular business to a particular class; prohibits all others from engaging in it." * * *

> "It is a paternalism to assume that citizens are incapable of prudently contracting with reference to their property without an express grant of the state, in the shape of corporate franchise, to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the legislature in the ordinary affairs of business life; or else it is a species of tyranny in government, like that of Turkey, where the rights to produce, manufacture, and trade are all the subject of grant from the sultan. If the exercise of the right of contract to indemnify be injurious to the public, then it ought to be prohibited; if beneficial, it ought not to be monopolized by a few."

We are impressed with the belief that the dissenting opinion of Dean, J., concurred in by Sterrett, C. J., and Green, J., in the Pennsylvania case presents better and stronger reasoning than does the opinion of the majority of the court.

The opinion of the court in *Marymont v. Nevada State Banking Board,* 111 Pac., 295, is the most elaborate opinion on the subject and held the Nevada banking act of March 24, 1909, to be unconstitutional because it prohibited partnerships, firms and individuals from engaging in the banking business except by means of a corporation. In the course of a lengthy opinion the court among other things said:

> "No good reason appears for upholding as a police regulation a statute which confers no benefit to the public or any portion of the community, and results only in injury by prohibiting citizens from following a beneficial avocation. The Legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful avocation and proper regulation will prevent injury to

others." * * * "In *First State Bank v. Shallenberger* (C. C.), 172 Fed., 1000, the court stated: 'The banking business is one of the ancient and ordinary occupations, and has been and is recognized as a lawful business, not only in the state of Nebraska, but in all states of the Union, and in general in all countries that have developed civilization and commerce. It has not been regarded as a business of such harmful tendencies that society might entirely forbid its exercise." p. 296. * * *

"If the Legislature can prohibit the individual from engaging in the banking business, as our statute seeks to do, it is evident that it may also prohibit corporations from engaging in the business, for a corporation, which is merely a creature of the law, can have no greater fundamental rights than the individual, for whom the constitutional guaranties are directly provided. Therefore, if both the individual and the corporation may be prohibited, this business, so essential to the carrying on of commerce and trade, and so necessary to the welfare of the state, may be entirely suppressed. The sustaining of this statute would be an entering wedge and a precedent which would authorize further encroachments upon the rights assured to our citizens by the Constitution. If we should uphold as valid this act, denying to individuals the right to embark in the banking business, and the next Legislature should pass another providing that corporations could not engage in that pursuit, we perceive no ground upon which that act could be held invalid which would not apply to the present one. We have different statutes regulating mining and providing for the safety of the men employed. The desirability and validity of laws for the prevention of the spread of contagious diseases among animals and certain pests which destroy agricultural crops are recognized. If the next Legislature should pass a law prohibiting individuals from engaging in the business of mining and farming, and later

in the session should pass another act providing that corporations should not engage in either of these pursuits, there would be no reason for holding such acts invalid which would not apply to the statute under consideration. If the argument in favor of this act is good, the same would be sufficient to support legislative enactments prohibiting individuals and corporations not only from engaging in banking, mining, farming and the raising of live stock, but from merchandising, keeping hotels, operating factories, and pursuing other avocations. Qualifications, examinations, and regulations are prescribed for the practice of law, medicine, and dentistry. If the individual may be denied the right to engage in the business of banking, may not the right to follow the various professions be limited to corporations, or even denied to both individuals and corporations? If the state has the right to prohibit the citizen from following ordinary pursuits, may not the Legislature exercise a less restrictive power, and either for a price or without charge farm out to favored individuals, corporations, and monopolies the right to pursue the various avocations upon which the people depend for their living and prosperity?' " p. 297. * * * * * * *

"By far the heaviest failures in this state have been of incorporated banks, and, as the law existed before amendment, there was not as much liability on the part of the officers for receiving deposits on the eve of a closing of these banks as would have attached to the receipt of deposits by private bankers about to fail. *Ex parte Rickey*, 31 Nev., 83, 100 Pac., 134." p. 300. * * *

The opinion in the Nevada case is exhaustive in its excerpts from other cases relating to the constitutional rights of the citizen as to his personal and property rights and the right to pursue any lawful avocation or calling.

THE CASE AT BAR DOES MORE THAN SIMPLY PROHIBIT PRIVATE BANKING, IT WINDS UP THE AFFAIRS OF EXISTING PRIVATE BANKS. IF THEY CONTINUE BUSINESS THROUGH THE AGENCY OF A CORPORATION IT IS CONDITIONED THAT THEY SHALL AGREE THAT A PART OF THEIR PROPERTY SHALL BE TAKEN TO PAY THE PRIVATE DEBTS OF OTHER BANKS.

The court in the case at bar, in speaking to that point, said, rec. p. 53:

> "The act not only attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation, but also attempts to impose upon them, as a condition to their engaging in that business even in that form, a duty to make good the obligations of all other bankers in the state to their depositors."

In *State v. Scougal, supra,* the court put the query:

> "Can the citizen be required to abandon a business, not necessarily injurious to the community, which he is carrying on, and be required to invest his capital in a corporation over which he may have no control, except as a mere stockholder, or otherwise be deprived of his right to pursue his lawful calling?"

When a man acts through a corporation he is not acting in his individual, natural and inalienable right as a citizen, but is only acting as the agent of an artificial creation. The "liberty" and privileges and immunities of citizens which are protected by the Constitution do not attach to corporations. We put the query, can a statute be ruled to be a regulation of a natural, inherent and inalienable right of the citizen when it takes from him the "liberty" and the "privileges and immunities" which are protected in the citizen by the Constitution of the United States?

Confessedly, the State does not possess the right to compel a citizen to accept of a corporate charter nor can it compel him to become a member of a corporation.

The distinction between the rights of an individual and the rights of a corporation are well known. The corporation can only come into being by the permission of the state. When it comes into being the period of its life can be fixed by the state. When it comes into being the state may surround it with all limitations and restraints agreeable to the pleasure of the state. It only has such powers as the state may give it and can exercise no powers which the state elects to withhold. Its charter, which is its life, is granted subject to the right of the state to at any time amend or repeal the law of its creation. The supervisory power provided in the Bank Depositors' Guaranty Law, the taking of part of the assets of such a corporation and appropriating the same to the payment of the debt of another corporation, or as a gratuity to a private individual, *confessedly* could not be applied to a citizen. The primary purpose of the law in requiring banking to be conducted by corporations *is to take from the banker* certain rights, privileges and immunities which would belong to him as an individual.

The phrase, "Liberty and the Pursuit of Happiness," and the words, "Privileges and Immunities," include the right of the citizen to select and carry on any lawful business, calling or avocation. We recognize the right to restrain the business by the citizen which may be "calculated to produce idleness, vice or debauchery," or which is "prejudicial to the health or morals of a city," or which is "the cause of pauperism and crime," (*Mugler v. Kansas*, 123 U. S. 623), but the business of banking is recognized as essential to the commercial well-being of the city, of the state and of the nation. It always has

been and it always will be so. Hence we say it is a business or avocation that is included within the phrase, "Liberty and the Pursuit of Happiness," and the words, "Privileges and Immunities."

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Mr. Justice Field, in the *Slaughter House Cases,* 16 Wall., 97, in speaking of the privileges and immunities, said that they include "the enjoyment of life and liberty with the right to acquire and possess property of every kind. * * * Clearly among these must be placed the right to other restraint than such as equally affects all persons." pursue a lawful employment in a lawful manner without

In the same case *Bradley, J.,* said:

> "This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where their rights are arbitrarily assailed." (p. 116). * * *
>
> "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section." (p. 122).

In *Butchers' Union Co. v. Crescent City Co.,* 111 U. S., 746, *Mr. Justice Field* said, p. 757:

> "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right

to pursue *any lawful business* or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment." * * * "The right to pursue them, *without let or hindrance,* except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In the same case *Mr. Justice Bradley* said:

"The right to follow any of the common occupations of life is an *inalienable right;* it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the *express words of the Constitution.*" (p. 762). * * * "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." (p. 764.) * * * "The Fourteenth Amendment goes further, and declares that 'no State shall abridge the privileges and immunities of citizens of the United States,' which includes the citizens of the State itself, as well as the citizens of *other states.*" (p. 765).

In *Allgeyer v. Louisiana,* 165 U. S., 578, *Mr. Justice Peckham* quoted from *Mr. Justice Bradley* in the last case *supra,* and added, p. 590:

> "It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word *'liberty,* as contained in the Fourteenth Amendment."

In defining the scope and meaning of the words, "Liberty and the Pursuit of Happiness," and the words, "Privileges and Immunities," it was said in *State v. Scougal,* 3 S. D., 55: "It means freedom of action; freedom in the selection of a business, calling or avocation; * * * freedom in exercising the rights, privileges, and immunities that belong to the citizens of the country generally; and freedom in the pursuit of any lawful business or calling selected by him."

In *Matters of Jacobs,* 98 N. Y., 98, it is said: "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, *and to pursue any lawful trade or vocation."*

In *Gillespie v. The People,* 188 Ill., 183, it is said: "The rights of 'life,' 'liberty' and 'property' embrace whatever is necessary to secure and effectuate the enjoyment of those rights."

In *Braceville Coal Co. v. People,* 147 Ill., 66, it is said, p. 71, that liberty, as that term is used in the Constitution, "Is deemed to embrace the right of every man to be free in the use of his powers and faculties and to adopt and pursue such *avocation or calling as he may choose,* subject only to the restraints necessary to secure the common welfare."

In *People v. Marx,* 99 N. Y., 377, the court in speak-

ing to the same point, said: "Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit."

In *Wyeth v. Cambridge Board of Health,* 200 Mass., 474, it is said, p. 478: "The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the Constitution of the United States, which does not permit a State to deprive any person of life, liberty or property without due process of law."

It has been ruled in New York that a statute is unconstitutional which limited the right of a citizen to become a member of a copartnership. O'Brien, J., in Schnaier v. Navarre Hotel & Importation Co., 182 N. Y., 83, said, pp. 88-89:

> "The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States, and a *law which prevents or hinders a man from going into partnership* with another for the purpose of carrying on the trade, business or calling of employing or master plumbers, infringes his natural rights as secured by the Constitution.
>
> There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.
>
> All laws, therefore, which impair or trammel these rights which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his house or restrain his otherwise lawful movements, are

infringements upon his fundamental rights of liberty, which are under constitutional protection.

The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms.

The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States.

These propositions are taken from some of the numerous cases on the subject and they are now so familiar that it is scarcely necessary to cite the cases where they may be found. (*Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Yick Wo. v. Hopkins*, 118 U. S. 356; *Slaughter House Case*, 16 Wall. 36, 106; *Colon v. Lisk*, 153 N. Y. 188; *People v. Gillson*, 109 N. Y. 389; *People v. Marx*, 99 N. Y. 377; *In re Jacobs*, 98 N. Y. 98.)

The recent case of *Lochner v. State of New York* (198 U. S. 45), is far reaching in its scope and effect. The principle that the individual right to make contracts in relation to business is a part of that liberty protected by the Constitution was asserted and maintained, and a statute of this state which made it a penal offense for a master to permit his servant to work more than ten hours in the day has been held to be in conflict with that right, and was, therefore, unconstitutional and void. That case amply vindicates the right of the individual to freedom in the conduct of any legitimate business and his right to make contracts concerning the same.

It cannot be denied that the statute in question operates to prohibit two persons, situated as the firm in this case was, to enter into partnership for conducting a legitimate business. * * *

The right to form partnerships for the conduct of business has existed from time immemorial and any interference with that right must be re-

garded as an unwarranted interference with individual freedom condemned by the Constitution."

In *People v. Ringe,* 197 N. Y. 143, the court held a statute unconstitutional which prohibited the formation of a partnership for the business of undertaking, unless each member was licensed, and said, p. 151:

> "The provisions of the act under consideration, so far as they prohibit a firm from engaging in the business or practice of undertaking unless each member of the firm is a licensed undertaker, are clearly unconstitutional within the reasoning of the Schnaier case."

In view of the right to liberty and the pursuit of happiness and the right to enjoy the privileges and immunities, which are guaranteed to citizens by the Constitution, it seems to follow as of course that the state cannot compel a citizen to surrender the management of his own business and ownership of his own property to a corporation or otherwise have it taken possession of by a receiver. Query. Is not the citizen at liberty to handle his own business in his own way, not subject to corporate control? Is there any power in the state to compel a citizen to become a stockholder in a private corporation or to compel him to accept of a corporate franchise from the state? The principles announced in the foregoing cases answer no.

The State cannot compel private bankers to incorporate. The formation of corporations must be the voluntary act of the parties.

Cook on Corporations, 4th Ed., Vol. 1, Sec. 2-a.

> "It is an old principle of law that individuals cannot be compelled by the state to accept a charter to act as a private corporation."

Thompson on Corporations, Vol. 1, Sec. 52.

> "But a man cannot be forced by the legislature to become a member of a strictly private corporation without his consent."

In *Dartmouth College v. Woodward,* 4 Wheat, 518, *Story, J.,* said, p. 707-8:

> "Nothing seems better settled at the common law than the doctrine that the crown cannot force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporation. *Rex v. Vice-Chancellor of Cambridge,* 3 Bur. 1656; *Rex v. Pasmore,* 3 T. R. 240; 1 *Kyd. on Corp.* 65; *Rex v. Larwood,* Comb. 316. Neither can the crown compel a man to become a member of such corporation against his will."

If a law be unconstitutional which prohibits a citizen from pursuing a lawful calling and avocation (banking); if a statute be unconstitutional which prohibits the citizen from entering into a copartnership, if the citizen cannot be compelled by statute to accept of a private charter or to become a member of a private corporation, where is the authority to require a private banker to transfer his business to a corporation, or otherwise prohibit him from continuing in the business? It is an indirect method of violating the constitutional right of the citizen. It is an attempt to do indirectly that which confessedly can not be done directly.

GUARANTY FUND.

THE GUARANTY FEATURE OF THE LAW IS AN ARBITRARY AND CAPRICIOUS EXERCISE OF POWER OVER THE BUSINESS OF BANKING. IT TAKES THE ASSETS OF SOLVENT BANKS WITHOUT COMPENSATION AND APPROPRIATES THE SAME TO THE PAYMENT OF THE PRIVATE DEBTS OR INSOLVENT BANKS IN VIOLATION OF SEC. 10 OF ART. 1, AND SEC. 1 OF ART. 14 OF THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF SECS. 3 AND 16 OF ART. 1 OF THE CONSTITUTION OF NEBRASKA.

Sec. 44 of the Bank Guaranty Law provides that every banking corporation shall be subject to an assessment for the Guaranty Fund. Sec. 45 provides "the State Banking Board shall levy assessments against the capital stock" of each banking corporation of one-fourth of one per cent of the average daily deposits within 60 days after the taking effect of the Act, and a like assessment of one-fourth of one per cent of the average daily deposits on the 1st days of January and July of 1910, and on the 1st day of January, 1911, and an assessment of one-twentieth of one per cent of the average daily deposits on the 1st day of July and January of each year thereafter. Sec. 46 provides said banks shall set apart, keep and maintain in their said banks the amount thus levied and shall constitute a "Depositors' Guaranty Fund" payable to the State Banking Board on demand. Sec. 47 provides for the levy of special assessments in the event a deficiency shall arise in the Guaranty Fund.

Sec. 52. "The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims," (except certain taxes) "shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation * * * including the

liability of stockholders, and upon proof thereof they shall be paid immediately out of the available cash in the hands of the receiver." If the cash "shall be insufficient to pay the claims of depositors" the Banking Board shall draw against the Depositors' Guaranty Fund to supply the deficiency "to be applied on said claims of depositors."

It appears from the Bill of Complaint that each assessment will amount to the sum of $182,482.75 and that the first four assessments will aggregate and amount to $766,440.15 and that the gross amount of said assessments upon each of the complainant banks will exceed the sum of $2,000, exclusive of interest and costs (rec. p. 12.) By Sec. 52 of the Act these sums of money may be appropriated by the Banking Board to the payment of "claims of depositors" in any bank which may become insolvent.

By said Sec. 52 it is first provided that claims of depositors for *deposits* and claims of holders of *exchange* shall have priority over all other claims (except taxes) and shall be a first lien upon all the assets of the bank, including the liability of stockholders, *but* the claims of holders of exchange do not share in the Guaranty Fund. In the second sentence of Sec. 52, it is provided that if the cash in the hands of a receiver "be insufficient to pay the claims of depositors" the Banking Board shall draw against the Depositors' Guaranty Fund to supply such deficiency, meaning the deficiency of claims of depositors.

Aside from the distinction noted *supra* all other creditors of the bank are excluded from any share in the Guaranty Fund. All other creditors are excluded from any share in the assets until the depositors are first paid.

By Sec. 52 it is expressly provided that the claims of depositors and claims of holders of exchange "shall have priority over all other claims" and shall be a first lien upon all the assets, including the liability of stockholders. If, thereafter, these preferred claims absorb all of the assets then the claims of all other creditors are excluded from any dividends whatsoever.

The primary question here is, can the state compel all of the banks in the state to contribute a part of their assets to a guaranty fund which shall be used by the Banking Board to pay private debts which some other insolvent bank may owe to its depositors? The fundamental error in the law is in this, that it takes the money of banks without their consent, and without compensation, and appropriates the same in payment of a private debt, a gratuity to the person to whom paid.

This law is distinguished from those contained in the cases cited in appellants' brief. We agree that the state may, by proper legislation, require an insurance company to have a surplus fund on hand for the purpose of paying its losses *to its own policy holders,* and that a reasonable penalty may be assessed for unreasonable delay and default in making payments; likewise, that a bank may be required to have a specified surplus for the purpose of securing *its own depositors.* But it is another question whether the state can levy an assessment upon all insurance companies for the purpose of creating a guaranty fund by which the policies of an insolvent company shall be paid. The fact that a railroad company may be subjected to a reasonable penalty for unreasonable delay in settling a claim against it would not justify the state in levying an assessment upon all railroad companies for the purpose of paying the debt of *another* railroad company. If the police power is broad

enough to compel banks to submit to the guaranty fund then the state, under the same claim of power, might compel all public service corporations, such as gas companies, electric light companies and street railway companies, to contribute to a common fund for the purpose of paying the debts of other like companies.

The Circuit Court in the case at bar in its opinion said, rec. p. 51:

> "In fact, the failure of large railway, insurance, mercantile or manufacturing companies may, and often does, more profoundly affect the business community than the failure of a small bank. If the state possesses the power to single out a certain form of business activity and to compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate, as often as inequality of fortune may arise."

> "The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers, but payment is required to all depositors, whatever their financial condition may be. It is insisted that the provision in question is similar to those regulatory measures often imposed upon banking and other business interests, whereby the state lawfully imposes license fees, requires frequent examinations or inspections, designates the character of investments that may be held, prescribes the amount of capital necessary to engage in a designated business, and the like. It is sufficient to say that these and similar measures are

> founded on the theory that they merely require the one upon whom they are imposed, to pay the expense of inspection of his own business, and to safeguard those who deal with him."

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The taking of the assets of one bank to pay the claims of depositors of another bank is taking property for a private use without due process of law, and without compensation.

Loan Association v. Topeka, 20 Wall., 655, is a case which necessarily leads to the conclusion that every statute which takes property from one person and confers it upon another without compensation, is unconstitutional and void. In said opinion *Mr. Justice Miller* put much stress upon the principle we have heretofore mentioned in this argument, that creditors of banks have no superior claim to public protection than other classes of people, and said:

> "But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

This court, in *Cole v. La Grange*, 113 U. S., 1, held a statute of Missouri to be unconstitutional which authorized a city to issue its bonds by way of donation to a manufacturing corporation on the ground that the same was taking property for a private use without the owner's consent. *Mr. Justice Gray* said, p. 6:

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object."

This court in *Parkersburg v. Brown*, 106 U. S., 487, held a statute of West Virginia to be unconstitutional which authorized the city of Parkersburg to issue bonds in aid of a manufacturing enterprise. *Mr. Justice Blatchford* said, pp. 500-501:

> "But we are of opinion that, within the principles decided by this court, in the case of *Loan Association v. Topeka*, 20 Wall., 655, the bonds in question here are void." * * * "It is taxation which takes the private property of one person for the private use of another person." * * * "There was no provision in the Constitution of West Virginia of 1862 authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the legislature had no power to enact the act of 1868."

The guaranty of bank deposits presents no stronger appeal to the public than did that of the sufferers from the grasshopper plague. The state of Kansas in 1875 passed a statute for the relief of the farmers whose lands had been devastated by that scourge; but the Supreme Court of that state (*State v. Osawkee Township*, 14 Kan., 418), held that such statute was unconstitutional, and

that the bonds which it proposed to issue should be enjoined. In that case, among other things, the court said:

> "It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus directly result in a great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized, in its application to this class, who can tell how soon it may be invoked in aid of another."

In 1872 the city of Boston suffered greatly from a conflagration, and the legislature enacted a law authorizing the city of Boston to issue bonds to the amount of twenty million dollars for the relief of the sufferers, and to promote the rebuilding of the city. But the Supreme Court held the statute to be unconstitutional *(Lowell v.* Boston, 111 Mass., 454), and the court among other things said:

> "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental." * * *

> "The power of the government thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication, as well as by express terms, to purposes and objects alone which the government was established to promote, to-wit, public uses and the public service." * * *

> "But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."

So far as the public are concerned, there was manifestly greater urgency in the Kansas case and in the Massachusetts case for relief than in these Bank Guaranty cases. In the case at bar it is simply proposed to take the assets of certain banks and bestow them upon a certain class of creditors as a gratuity, and without any real justification therefor.

Baltimore & Eastern Shore Railroad Co. v. Spring, 89 Md., 510, is a case that involved the constitutionality of the statute of Maryland authorizing county bonds to be issued for the benefit of an insolvent railroad company upon the condition that *claims* against the railroad, held by bona fide *residents* of the county, should be *first paid*. The court held that the issuing of said bonds was for a *private* purpose, and that the bonds should be enjoined. Among other things the court said:

> "The conclusion seems to be inevitable that the effect and scope of the act is simply to levy a tax upon the property of the citizens of Talbot County, to pay to certain residents of that county the claims due to them by an insolvent railway company. This is a private purpose, and not one of the objects of taxation."

The state of Nebraska at one time passed an act requiring railway companies to permit the construction of grain elevators on their right of way, which elevators were to be used by the farmers and public generally. This Court in *Mo. Pac. Ry. Co. vs. Nebraska*, 164 U. S., 403, held this statute to be unconstitutional, and among other things said, p. 417:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of the private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment to the Constitution of the United States."

Speaking to the same point *Mr. Justice Miller,* in *Davidson vs. New Orleans,* 96 U. S., 97-102, said:

> "But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."

The Nebraska case appeals more strongly to our sense of right than the Guaranty Deposit Law because the right of way which was to be utilized was owned by the railway company as a quasi-public corporation for the benefit of the public. In Nebraska there has not been even the semblance of a financial panic to give color or

plausibility to this attempt to take the property of some persons and turn that property over to others without compensation.

The United States Circuit Court of Appeals for the 8th Circuit *(Dodge v. Mission Township, Shawnee County, Kan.,* 107 Fed., 827), held a statute of the state of Kansas to be unconstitutional which authorized the issuing of bonds to encourage the erection of mills and the manufacture of sugar and syrup out of sorghum cane. In said case, *Sanborn, Circuit Judge,* said, p. 828:

> "It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty, or property without due process of law. The prohibition of such a deprivation by the states is found in the fourteenth amendment to the Constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority." * * * "A legislative act which takes, or undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect."

Said case furnishes an answer to any suggestion that may arise under Section 1 by which banking is declared to be "a quasi-public business. *Sanborn, C. J.,* said:

> "A necessary corollary to these propositions is that a legislature, which has no power to authorize the levy of a tax or the creation of a public debt for a private purpose, has no power to draw that authority to itself, or to create it by its mere *declaration* that a private purpose is a *public*

> one. Any other theory would destroy the limitation. A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a *judicial,* and is not a legislative, function."

The legislature of the state of Ohio in 1904 enacted a statute entitled, "An act to provide relief for worthy blind," which provided that all male blind persons over the age of 21 years and all female blind persons over the age of 18 years, residents of the county, and who are without means of self-support, shall be entitled to receive not more than $25.00 per capita quarterly from the county treasury.

In *Lucas Co. vs. State,* 75 Ohio St., 114, the said law was held to be unconstitutional for the reason that it was an appropriation of the money for a private purpose in violation of the constitution. The court said, p. 135:

> "It is an indeterminate *gratuitous* annuity, a gift pure and simple, and, being so, the legislature is without authority to make it from the public funds."

The court quoted liberally from the case of *Loan Assn. vs. Topeka,* 20 Wallace, 655, and especially put stress upon what *Mr. Justice Miller* said in said case, that "the merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good and equally deserving the aid of the citizens by enforced contributions." The Ohio court thence concluded its opinion, p. 136:

> "If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge, then innumerable classes may clamor for similar

> bounties, and if not upon equally meritorious ground, still on ground that is valid in point of law, and it is doubted that any line could be drawn short of an equal distribution of property."

State vs. Froehlich, 118 Wis., 129, (99 Am. St. Rep., 985), is a case where the court held a statute of the State to be unconstitutional which authorized a levy of a tax to make provision for the treatment and cure of inebriates on the ground that the said tax was for the benefit of "private institutions and individuals not the legitimate objects of public charity." In the body of the opinion is found quoted from *Mr. Justice Dixon* the following pertinent language:

> "'The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere *private* purpose. It cannot, in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction.'"

William Deering & Co. vs. Peterson, 75 Minn., 118; 77 N. W. 568, the court held a statute of Minnesota to be unconstitutional which appropriated "money for seed grain loans to farmers * * * whose crops were destroyed by hail or storms."

The guaranty fund provision of the act is a phase of paternalism that is obnoxious to our system of government. It falls within what was said on this subject in *State vs. Switzler,* 143 Mo., 287; 65 Am. St. Rep., 653. In that case the court held a statute unconstitutional which imposed a succession tax and provided that the proceeds thereof should be appropriated for furnishing free scholarships in the State University for persons who were financially unable to pay for their education, etc. The

opinion is elaborate and interesting on many phases of the case, but on the subject of paternalism the court said, p. 664:

> "Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government's to support him. Under self-government, we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri."

The suggestion in appellants' brief that the taking of the money from one bank to pay the debts of another bank to its depositors is not the taking of money for a private use is untenable. The relation between the bank and the depositor is that of debtor and creditor.

The claim of the depositor is the claim of a private individual. The *public* as such has no interest in the

money which is paid to the depositor. The claim of the depositor is as much a private claim as the claim of the individual against a fire insurance company, or the heirs of a deceased against a life insurance company, or of a creditor of a manufacturing company.

A bank has been held by this court to be a private as distinct from a public corporation. Mr. Justice Story in *Dartmouth College v. Woodward,* 4 Wheat. 518, in defining the distinction between public and private corporations, said, p. 669:

> "But a *bank,* whose stock is owned by private persons, *is a private corporation,* although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person."

This court has gone so far as to hold that even though a sovereign state owns stock in the bank, that, nevertheless, the bank remains a private corporation and that a suit against the bank is not a suit against the state. *Marshall, C. J.,* in *Bank of the United States v. Planters' Bank of Georgia,* 9 Wheat. 904, 907, said, p. 907:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a *private* citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a *level* with those with whom it associates itself, and takes the character which belong to its associates, and to the business which is to be transacted. Thus, many States of this Union

> who have an interest in *banks*, are not sueable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the *bank*, and waives all the privileges of that character."

What was said by *Chief Justice Marshall* in the case *supra* was quoted with approval and followed by *McLean, J.*, in *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Peters 257-324.

Mr. Justice Baldwin in *Bolton v. White*, 2 Cranch C. C. 426, said:

> "Generally speaking, public corporations are towns, cities, counties, parishes, existing for public purposes; *private corporations are for banks*, insurance, roads, canals, bridges, etc., where the stock is owned by individuals, but their use may be public."

Mr. Justice Grier in *Rundle v. Delaware & R. Canal*, 1 Wall. Jr., 275, said:

> "In the popular meaning of the term nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus all *bank*, bridge, turnpike, railroad, and canal companies are private corporations. In these and other similar cases, the uses may in a certain sense be called public, but the *corporations are private*, as much so as if the franchise were vested in a single person. *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.), 669."

In *State Bank of Ohio v. Knoop*, 16 How, 369, *McLean, J.*, said, p. 380:

> "But a bank, where the stock is owned by individuals, is a private corporation. This was not denied or questioned by the counsel in argument, although it has been controverted in this case elsewhere. But this court and the courts of the different States, not excepting the supreme court of Ohio, have so universally held that banks, where the stock is owned by individuals, are private corporations, that no legal fact is susceptible of less doubt."

The fact that a State Bank is a private corporation adds force to our contention that the claim of a depositor in a bank is a private claim, and that the taking of the money from the banks by the process of the Guaranty Fund to pay the depositors of another bank is an appropriation of the money to a private use and not for a public use.

The cases heretofore cited in this argument and collated in the opinion of the Circuit Court in this case, together with others therein cited, are cases were statutes were held to be unconstitutional because the appropriation was to a private use. In every one of said cases there was as much semblance to a public use as in the case at bar. The cases there so collated followed the rule announced in this court in *Loan Association v. Topeka,* 20 Wall. 655, in which *Mr. Justice Miller,* among other things, said, rec. p. 52.

> "The merchant, the mechanic, the innkeeper, the *banker,* the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."

In the case at bar the Circuit Court in its opinion added, rec. p. 52.

> "It is needless to review at length the many cases which hold to the same effect. See *Parkers-*

burg v. Brown, 106 U. S. 487, 491, 1 Sup. Ct. 442, 27 L. Ed. 238 (bonds to aid manufacturers); *Cole v. La Grange*, 113 U. S. 1, 9, 5 Sup. Ct. 416, 28 L. Ed. 896 (bonds to aid manufacturers); *Dodge v. Mission Tp.*, 107 Fed. 827, 832, 46 C. C. A. 661, 54 L. R. A. 242 (bonds to aid manufacturers); *Allen v. Inhabitants*, 60 Me. 124, 11 Am. Rep. 185 (bonds to aid manufacturers); *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366 (bonds to aid manufacturers); *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39 (bonds to aid sufferers from Boston fire); *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744 (aid to flood sufferers); *Lucas County v. State*, 75 Ohio, St. 114, 135, 78 N. E. 955 (annuities for the blind); *Wisconsin Keely Institute Co. v. Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105 (bounty to private inebriate hospital); *State v. Froehlich*, 118 Wis. 129, 94 N. W. 50, 61 L. R. A. 345, 99 Am. St. Rep. 985 (bounty to private inebriate hospital); *State v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (bounty to students attending state university); *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123 (aid in erection of building for Grand Army post); *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99 (furnishing seed grain to farmers); *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568 (appropriation to purchase seed grain for those without crops; *Deal v. Mississippi County*, 18 S. W. 24, 107 Mo. 464, 14 L. R. A. 622 (bounties to growers of trees); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489 (taking of railway right of way for private elevator); *Atchison, T. & S. F. Ry. Co. v. Campbell*, 61 Kan. 439, 59 Pac. 1051, 48 L. R. A. 251, 78 Am. St. Rep. 323 (free tickets to stock shippers); *Harp v. Choctaw, O. & G. Ry. Co.* (C. C.), 118 Fed. 169 (compelling building of spur track to coal mine); *Ornard Beet Sugar Co. v. State of Nebraska*, 73 Neb. 57, 66, 68, 102 N. W. 80, 105 N. W. 716 (bounty for

growers of sugar beets); *Michigan Sugar Co. v. Dix*, 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354 (bounty for growers of sugar beets); *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 455 (bounty for growers of sugar beets)."

It is the taking of the assets of one bank without *compensation*. This cannot be done even though the property taken be appropriated to a public use.

In *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362-399, this court said:

> "The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, *without compensation*, wrested from him for the benefit of another, *or of the public*."

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79-87, this court again said:

> "The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, *without compensation*, wrested from him for the benefit of another, *or of the public*."

Confessedly, in the case at bar no compensation is given to the banks for the contributions which they are required to make to the guaranty fund.

Appellants cite no case that contravenes the fundamental principles of constitutional law quoted by us in the opening pages of this brief, to-wit: that the property of one person or company can not be taken to pay the private debts of another, and that to do so would be taking property without due process of law and would

be a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. That "taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation; it is simply robbery." And as was said by *Mr. Justice Miller* in *Loan Association v. Topeka,* 20 Wall., 655, would be "an unauthorized invasion of private rights."

By what principle of law can it be said that any bank holds its assets for the benefit of any other bank? By what principle of law can a depositor in one bank have a claim upon the assets of some other bank in which he is not a depositor?

Can a depositor in a bank that fails have any greater claim to be paid out of the assets of some other bank than a man whose property is insured to have his losses paid by some other insurance company in which he is not insured? Both in morals, in law and in good government there is no obligation resting upon any person or corporation to pay any debt or claim that does not rest upon a consideration.

If a state, by statute, can require a system of banks to make good the losses of independent banks, then the state can require the same thing of fire insurance companies, of life insurance companies, and all *quasi* public service corporations, and likewise of individuals engaged in any business over which the state has the power of regulation, which include grain elevators, hotels, dairies, bakeries, and a multitude of callings and pursuits. So, likewise, the state would have the power to require *depositors* in banks to *guarantee* each other's deposits, and to compel the borrowers from banks to guarantee the sums borrowed by others.

It would be an exercise of power by the state inconsistent with the principles and usages that have prevailed ever since governments have been established and is destructive of the liberties of the citizen, and in violation of the Fourteenth Amendment of the Constitution.

IV.

THE GUARANTY PROVISION OF THE NEW BANKING ACT IS NOT WITHIN THE SCOPE OF THE POLICE POWERS OF THE STATE. THE POLICE POWER HAS ITS LIMITATIONS. THE POLICE POWER CANNOT JUSTIFY THE INVASION OF ANY PROPERTY OR CONTRACT RIGHT OF THE CITIZEN GRANTED TO HIM UNDER THE CONSTITUTION.

The enjoyment of property has always been placed side by side with the enjoyment of life and liberty since the Declaration of Independence. Since that date there has not been a time when the property of one citizen could be taken from him for the private use of another without his consent. The plaintiff banks have a right to say that no part of their assets shall be taken from them without their consent and given to the creditor of another bank, *which creditor is not to return any part of said money and the bank from which the money is taken is not to be reimbursed.* This is the taking of property in violation of the Constitution of the United States and in no sense of the word is it within the police power of the state.

No sound reason can be given to justify this right to take. It can be urged with equal force that the state has a right to take (not from the bank, but from the depositor) a percentage of his deposits and use the same to make up any deficit that may come to depositors in other banks. *Why make the banks put up the money to pay these*

claims of depositors? Why not make the depositors as a class the insurers of themselves? Would any lawyer assert that the legislature has the right under the limits of the police power to take a part of each man's deposits to pay the individual claims of other depositors?

Why not as well enact a law that all persons who borrow money from the banks shall contribute a part thereof to a general fund to guarantee the prompt repayment to the banks of the money so borrowed, and to make up to the banks any deficiency arising from the insolvency of a borrower? It would be a rare thing for any bank to fail if it could call in its loans as they matured.

Would anyone say it was within the police power of the state to provide by law that the customers of banks should create a guaranty fund out of the sums loaned to them to protect the bank against embarrassment from forced extensions? A guaranty fund accumulated under the methods we have suggested would afford as good protection to the embarrassed bank or to the depositor in the insolvent bank as the guaranty fund provided for under this banking act, *and yet not even a politician* would suggest it as being within the police power of the state, or that it would not be an invasion of the constitutional rights of the person from whom the money was taken.

The application of the police power to the guaranty fund in the case at bar infringes the constitution and therefore is invalid. To say that any law which infringes the constitution under the guise of the police power is a valid law, is to say that the police power is superior to the constitution and equal to the declaration that there is no constitution. We rest our argument upon this branch of the case—that the Constitution is supreme. The po-

lice power reaches the border line when it comes in conflict with the Constitution.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, *Mr. Justice Harlan* said, p. 558:

> "But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or Statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted, in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their ic health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

That which we have quoted *supra* is incorporated in the opinion of *Mr. Justice Day* in *Dobbins v. Los Angeles*, 195 U. S. 223-237. In the last named case it was further added, p. 239:

> "But the exercise of the police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactment."

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S., 150, in principle is extremely close to the case at bar. In that case Texas enacted a statute which provided that persons having "a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," might file the claim for payment and if not paid within thirty days after presentation, suit might be brought and in addition to the judgment for the claim an attorney's fee of $10.00 should be

assessed. The court held that the said statute operated to deprive the railroad companies of property without due process of law and denied to them the equal protection of the law, in that it singled them out of all citizens and corporations, and required them to pay in certain cases attorneys' fees to the parties. It was in effect a statute to compel railroad companies to make prompt payment of their debts upon certain claims or to a certain class of individuals. The language of *Mr. Justice Brewer,* p 159, aptly applies to the facts in the case at bar:

> "Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class or corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

Minnesota v. Barber, 136 U. S., 313, is a case where a statute of Minnesota, which under the pretext of protecting the public health, provided for inspection of cattle, sheep and swine before slaughtering, was held to be unconstitutional. The court held that it would determine for itself whether the act was the proper exercise of the police power. The court said, p. 319:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title,

> namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. * * * In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

Lake Shore, Etc., Railway Co. v. Smith, 173 U. S., 684, is a case where the state of Michigan passed an act requiring railway companies to sell one thousand-mile tickets at a rate less than the maximum rates fixed by a general statute of the state. The state endeavored to sustain this law under the police power, but the court held the statute to be unconstitutional as taking the property of the railway companies without due process of law. *Mr. Justice Peckham,* in speaking directly of the police power, said, p. 699:

> "This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a state directly and plainly violates a provision of the Constitution of the United States, such legislation would be void."

Colon et al. v. Lisk et al., 153 N. Y. 188, is an interesting case and much in point and principle. The state of New York passed a statute providing for the seizure of any boat or vessel used by one person in interfering with oysters or other shell fish belonging to another, and for the forfeiture and sale, and payment of the avails to the commissioners of fisheries, game and forest. The statute was held to be void and in violation of the provision of the Constitution that no person shall be deprived of "life, liberty or property without due process of law." There was just about as much justification in the seizure of a boat or vessel under the circumstances stated in said

statute, as there is for the taking of the assets of one bank; hence what the court said in that case seems quite appropriate, p. 195:

> "By virtue of what power can the legislature enact a statute forfeiting to the state the property of one person, upon the sole ground that he had in some manner interfered with the private rights of another, is an inquiry which at once presents itself. Such an act would seem to be in clear violation of the provisions of both the Federal and State Constitutions, which insure to every person his life, liberty and property, unless deprived of them through the regular and proper administration of the law according to the rules and forms which have been established for the protection of private rights or the punishment or prevention of public wrongs."

In speaking of the limitation of the police powers the court said, p. 196:

> "* * * The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." * * * "Whenever the legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizen's rights."

The court in condemning this species of legislation for the benefit of private rights said, p. 198:

> "Its sole purpose was to regulate private interests and enforce private rights. In no sense can it be regarded as a police law, and, consequently, is not within the police power."

The legislature of the state of Wisconsin enacted a law which provided that if a citizen should become a habitual drunkard and "is pecuniarily unable to procure and pay for treatment," he may be sent to an institution at the expense of the county in which he resides. Said law was held to be unconstitutional and not within the police power of the state. *Wisconsin Keely Co. vs. Milwaukee County,* 95 Wis. 153 (60 Am. St. Rep. 105). In said case the court said, p. 107:

> "We are clearly of the opinion that the act in question is not an exercise of the police power as above defined. On the contrary, it is for private purposes, and to benefit private parties. The plaintiff is a private corporation, organized under the general laws of the state, and conducted for private gain. The mere fact that it is subject to visitation and inspection by public officials does not make it a public institution."

If the Nebraska Bank Guaranty Act be construed as it purports to be in its purpose and effect to compel banks to pay their depositors in full, it does not come within the scope of a police regulation. Speaking to this point *Mr. Justice Brewer* said in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S., 150-158:

> "But a mere statute to compel the *payment of indebtedness* does not come within the *scope of police* regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

V.

THE POLICE POWER IS THE LAW OF NECESSITY, WHICH MEANS MORE THAN EXPEDIENCY.

NO NECESSITY EXISTS FOR THE NEBRASKA BANK GUARANTY LAW.

It appears from cases *supra* that the exercise of the police power must stop short of infringing constitutional rights. This was held in the cases cited *supra*, to-wit: *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540-558; *Dobbins v. Los Angeles*, 195 U. S. 223-237; *Minnesota v. Barber*, 136 U. S. 313-319; *Lake Shore, Etc., Ry. Co. v. Smith*, 173 U. S. 684-699; *Colon et al. v. Lisk et al.*, 153 N. Y., 188-195; and also in the following cases: *Central of Georgia Ry. Co. v. Murphy*, 196 U. S. 194-206; *Richey v. People*, 155 Ill., 98-110; *People v. Gillson*, 109 N. Y. 389-98; *Fisher & Co. v. Wood*, 187 N. Y. 90-94; *State v. Goodwill*, 33 W. Va., 179, 35 Am. St. Rep. 863-868:

Whether a statute is within or without a proper exercise of the police power is a question always subject to final determination by the courts. *Dobbins v. Los Angeles*, 195 U. S. 223-236-239; *Lawton v. Steel*, 152 U. S. 133-137; *Jew Ho. v. Williamson*, 103 Fed. 10-17-20; *Ex Parte Whitwell*, 98 Cal. 73 (32 Pac. 870); *Hume v. Laurel Hill Cemetery*, 142 Fed. 552-553; *Rushtrat v. People*, 185 Ill. 133; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863-868; *Colon v. Lisk*, 153 N. Y. 188-196; *Fisher & Co. v. Woods*, 187 N. Y. 90-95.

In addition to the limitations of the police power stated in the two preceding paragraphs, it must also appear that the attempted exercise of the police power is the result of *necessity* rather than *expediency*.

In *Chy Lung v. Freeman et al.*, 92 U. S. 275, *Mr. Justice Miller* said, p. 280: "Such a right can only arise from a *vital necessity* for its exercise, and cannot be carried beyond the scope of that *necessity.*" In *Railroad Co. v. Husen*, 95 U. S. 465, *Mr. Justice Strong* said, p. 472: "It may not interfere with transportation into or through the State, beyond what is *absolutely necessary* for its self protection."

In *Bryan v. City of Chester*, 212 Pa. St. 259, the court quoted with approval from *Crawford v. City of Topeka*, 51 Kan. 756: "All statutory restrictions of the use of property are imposed upon the theory that they are *necessary* for the safety, health or comfort of the public; but a limitation without reason or *necessity* cannot be enforced."

In *City of Passaic v. Patterson, Etc. Co.*, 72 N. J. Law, 285, the court said: "It is *necessity* alone which justifies the exercise of the police power to take private property without compensation." The three last cases *supra* were quoted with approval in *People v. Murphy*, 195 N. Y. 126, and to which the court said, (p. 135): "The classification, as well as the ordinance itself, must be based upon some *necessity* justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of *self-preservation* in an individual."

In *State v. Redmond*, 134 Wis. 89, the court said, p. 110: "The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power."

In *City of Belleville v. Turnpike Co.*, 234 Ill., 428, the court said, p. 437: "It is co-extensive with the self-

protection, and is not inaptly termed the law of overruling necessity." It was on this principle that in *Sayre Borough v. Phillips*, 148 Pa. St., 482, a statute of Pennsylvania was declared to be unconstitutional because it applied to certain persons and not to others who are engaged in the same trade or pursuit. To justify the statute under the police power it should be the result of a demand of the public generally and there should be such an exigency for its enforcement to protect the public *that it should apply to all alike who are engaged in the same business.* Hence, in the Pennsylvania case, the statute was held to be not within the police power.

In the case at bar there is nothing in the record, nor existing in fact, to show that there is any exigency to the public generally demanding the Guaranty Fund. A large body of people may think that they want it, but that does not suffice. There must exist a necessity. No such condition exists. When Wall Street was under the whirl of excitement a couple of years ago Nebraska did not suffer. Her banks did not go into the hands of receivers. Depositors did not lose any money. *There is no more danger in the state of Nebraska of the public generally being injured by loss of money to depositors than there is of an invasion of Asiatic cholera or of bubonic plague.* No one would say at this time that the money of one class of corporations should be taken to create a fund to guard against such epidemics. The case at bar is one of a *political demand* for the protection of a *particular class.*

State v. Redmond, 134 Wis. 89, cited *supra*, is a case where a statute of Wisconsin gave the occupant of a lower berth in a Pullman car the privilege of having the upper berth remain closed if not occupied. Said statute was a

good illustration of what might be thought *expedient,* but did not come within the rule of *necessity.* Said statute likewise fell within the prohibition of the constitution that it is a taking of property without compensation and giving it as a gratuity to a private person, and was consequently held to be unconstitutional. Speaking to these points the court, in that case said, p. 113:

> "So the law is not, in reality, a police regulation, but an unwarranted interference with property rights; an attempt in the circumstances specified to give to any person, at his option, who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious, though well meant, attempt, it would seem, through mistaken notions of legislative power, to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guarantee that 'no person shall be * * * deprived of life, liberty, or property without due process of law,' and the further guarantee that 'private property shall not be taken for public use without just compensation therefor,' and the safeguard springing from the whole constitutional system that private property shall not be taken at all for private use, except in the enforcement of obligations *inter partes.*"

It is not possible that a necessity exists for the taking of the property of a bank without compensation and bestowing the same as a gratuity upon an individual, or in payment of a private claim.

Art. 5 of Amendments to the Constitution provides, "Nor shall private property be taken for public use, without just compensation." Sec. 21 of Art. 1 of the Nebraska Constitution provides, "The property of no person shall be taken or damaged for public use without just compensation therefor."

The property of banking corporations (private corporations) are as fully protected from spoliation as the property of private citizens. The manifest purpose of the statute is to take the money of banks to pay the creditors of an insolvent private corporation which is unable to pay its own debts. The purpose of the Guaranty Fund is in no sense governmental, it is a taking of private property for a private use without compensation. It is not a taking under the taxing power, or under the power of eminent demain, or under any recognized power of government. The state's duty begins and ends with the institution and conduct of civil government under which the person and property of the individual and corporation are made sacred within the guaranties of the constitution. It is true the state is charged with the duty of regulating banks and banking, because it owes a duty to its citizens to interpose its sovereign power to prevent abuse and injustice, but that is the exercise of a sovereign power. The exercise of that power does not carry with it a pecuniary obligation to pay the citizens' claim which he holds against other citizens or corporations. The state is under the obligation to institute and conduct a republican form of government but even a republican form of government may be quite *tyrannical* or *unjust* if its policies are so shaped and its framework so constructed as to conflict with the provisions of the national constitution.

The constitution does not authorize the levy of taxes, nor the taking of property for essentially private purposes, as has been repeatedly held, and herein lies the mistake of the framers and advocates of this Guaranty Law.

VI.

SOCIALISM.

THE PRINCIPLE WHICH UNDERLIES THE BANK GUARANTY DEPOSIT LAWS, WHEN CARRIED TO ITS ULTIMATE LEGITIMATE RESULT, MEANS UNRESTRAINED SOCIALISM IN STATE GOVERNMENT.

The principle which underlies the Bank Guaranty Deposit Law is, that the State has the right to provide by law that a part of the property of a class of corporations shall be taken without compensation and put into a General Fund to be appropriated by the State in payment of the claims of creditors of a corporation that may become insolvent. The viciousness of the principle is manifest in the fact that if the State can lawfully apply it to banks it can with equal right apply it to all corporations which are in somewise *quasi public* in character, such as Railroad Companies, Street Railway Companies, Electric Light Companies, Gas Companies, Water Companies, etc. If the State has this right it is but one step further to apply the same principle to every commercial or industrial corporation. It is but one step further for the State to say that it has the right, under the guise of the police power, to create a General Fund out of all industries of what ever kind or nature to pay their creditors.

There is no clear line of distinction between the application of the principle in the above cases and in the broad general declaration that the State has a right to create a community of interest in the individual in all the property within the state. It is a species of socialism so broad and unlimited that it knows no constitutional restraint.

VII.

THE ENTIRE ACT IS VOID. THE SECTIONS OF THE ACT OF WHICH WE COMPLAIN WERE INDUCEMENTS TO THE PASSAGE OF THE LAW AND ARE SO INTERWOVEN WITH ALL OF ITS PROVISIONS THAT IT IS MANIFEST THE LEGISLATURE WOULD NOT HAVE PASSED THE ACT WITH EITHER OF THEM ELIMINATED.

The Circuit Court in this case said, rec. p. 53:

> "It is also apparent that the prohibition of the right to engage in the banking business by individuals, except upon the terms stated, was the inducement to the passage of this act of the legislature. Unless it be wholly void, there is no other state statute regulating the conduct of the banking business, and to assume that the legislature would have passed this act, even although not applying to individuals, implies that it would have left individual bankers free from any restraint, with liberty to operate as many banks as they chose; to receive deposits, including the public money; to operate with little or no capital; to make no reports; be subject to no examination; to pay no license fees; while subjecting corporate banks to the strictest regulation, and only allowing them to do business when possessed of fixed and large amounts of capital.
>
> Counsel at the argument conceded, and rightly so, as we think, that if the act could not lawfully prohibit individuals from engaging in the banking business, except upon the terms stated, the whole act must fail. In this view of the case, it has not been necessary to decide whether or not the act could be sustained as to existing banking corporations, if it were valid in other respects."

By the terms of the act the assessment for the guaranty fund is made against "*the capital stock of each of said banking corporations*" (Sec. 45), and it is only cor-

porations "engaged in the business of banking under the laws of this state" which are made "subject to assessment" (Sec. 44). It is only "banking corporations" which shall receive notice of the assessment, and it is "banking corporations" which are required to set apart the amount of the assessment levied (Sec. 46). It is only incorporated banks which are required to make reports and against whom the banking board is authorized, through the instrumentality of the Attorney General and the courts, to apply for the appointment of a receiver in the event that such "corporation" is conducting its business in an unsafe or unauthorized manner or endangering the interests of its depositors, etc. (Sec. 48.) It is only against a *"banking corporation"* that depositors shall have a first lien and priority of payment of claims. (Sec. 52.) The act only provides for filing claims by depositors "against the corporation" whose poperty is under such receivership. (Sec. 51.)

Thus we see without further detailed reference that nowhere in the act is there any power or authority given to anybody to deal with private banks except the provisions which prohibit private banks from transacting business, and winding up of their affairs by a receivership. The act repeals Chapter 8, which comprises the entire existing banking laws of the state, without reservation or limitation. It follows, of course, that if the act is unconstitutional in so far as it prohibits private banking, and the remainder of the act is to stand, that private banks would not be subject to any regulation whatever, and the guaranty feature of the present act could be evaded by all incorporated banks discontinuing as corporations and resuming the business as private banks.

If the guaranty fund feature of the act is unconstitutional it must necessarily result in destroying the whole

act. The primary purpose of the law was to create a guaranty fund. The purpose of prohibiting private banking was to force all bankers into corporations on the supposition that the state would have the power to compel corporations to submit to the guaranty feature. Even the banking corporation cannot do business without the certificate reciting that it has complied with the guaranty fund and that its depositors are protected by the guaranty fund. (Sec. 14.) Every bank doing business under the laws of the state shall be subjected to the assessment for the guaranty fund and without which they cannot do business. (Sec. 44.) Every bank must file a report as the basis for the assessment for the guaranty fund. (Sec. 45.) All banks hereafter organized are compelled to submit to an assessment for the guaranty fund. (Sec. 45a.) All the banks in the state are required to set aside the amount assessed for the guaranty fund. (Sec. 46.) In case of the depletion of the guaranty fund additional assessments may be made upon every bank in the state. (Sec. 47.) After an examiner shall have taken possession of a bank it shall not be permitted to do business until it appears that all assessments for the guaranty fund with interest have been fully paid. (Sec. 50.) In case of receivership, statement of claims filed shall be made to the banking board and the deficiency on claims shall be paid out of the depositors' guaranty fund. (Sec. 52.) That the creditors of any bank which has not received the certificate provided for in Sec. 14 and paid the assessment provided for in Sec. 45 shall not receive the benefit of the guaranty fund. (Sec. 52.) The state banking board shall be subrogated to the rights of creditors paid out of the Guaranty Fund. (Sec. 53.) In case of a receivership the assets shall not be returned or paid to the party or parties entitled thereto until the receivership

shall have first paid "any liability to the Guaranty Fund." (Sec. 57.) The banking board may appropriate money out of the Guaranty Fund for rewards for the apprehension and conviction of criminals. (Sec. 60.)

It is safe to say that everything of importance incorporated into this new act, not already existing in the original banking laws of the state, consists in the prohibition of private banking and the creation of the Guaranty Fund. These were the sole impulse and motive for the passage of the law and *if these provisions fall* the entire law must fall with them. If these objectionable parts of the act are stricken out it is *impossible* to construct anything out of what shall be left that will have any continuity.

The law being unconstitutional in a material part the whole statute must be held to be unconstitutional. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540-564-5. *Ex parte Whitwell*, 98 Cal., 73, 32 Pac., 870-874. *Daggett v. Hudson*, 43 Ohio St., 548-567. *State v. Sinks*, 42 Ohio St., 345-350. *State v. Mitchell*, 97 Me., 66, 94 Am. St. Reps., 481-487. *Allen v. Louisiana*, 103 U. S. 80.

When the unconstitutional part of the statute "may have been the motive, inducement or consideration on which the other was founded," they must all fall together. *State v. Sinks*, 42 Ohio St., 345-451. *Jones v. Rollins*, 8 Gray, 329-339. *Warren v. Charleston*, 2 Gray, 84. *State v. Montgomery*, 94 Me., 192, 80 Am. St. Reps., 386-395. *Allen v. Louisiana*, 103 U. S. 80.

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